



**Written Testimony of
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Before the Select Subcommittee on the Coronavirus Pandemic of the
Committee on Oversight and Accountability
July 27, 2023**

INTRODUCTION

Chairman Westrup, Ranking Member Ruiz, and members of the Select Subcommittee on the Coronavirus Pandemic of the Committee on Oversight and Accountability, I am Danielle Runyan, Senior Counsel with First Liberty Institute, a nationwide legal organization dedicated to defending religious liberty for all Americans. Thank you for the invitation to provide testimony on this important topic.

While many Americans may have largely moved beyond the detrimental impacts of the COVID-19 vaccine mandates, one of our nation's greatest assets—our military service members—are still suffering the consequences. This testimony will explain the following: how the military mandates remained in effect long after all other Executive Branch-level mandates were overturned, the unlawful treatment service members received once they exercised their rights and lawfully objected to required vaccination, and how despite the 2023 NDAA language requiring rescission of the Department of Defense COVID-19 vaccine requirement, our national security remains at risk.

THE GOVERNMENT’S RESPONSE TO COVID-19 BEFORE THE MANDATES ISSUED

The World Health Organization declared the COVID-19 outbreak a public health emergency on January 30, 2020.¹ Vaccines first became available in December 2020.² At that time, Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, said that “if 75 percent to 80 percent of Americans are vaccinated in broad-based campaigns likely to start in the second quarter of next year, then the U.S. should reach . . . herd immunity threshold months later.”³ According to Dr. Fauci, “[i]f vaccination levels are significantly lower, 40 percent to 50 percent . . . it could take a very long time to reach that level of protection.”⁴

But by May of 2021, as reported by The Hill, Dr. Fauci changed his message, stating that “[t]he herd immunity threshold is not attainable — at least not in the foreseeable future, and perhaps not ever.”⁵ The article reported that “[i]nstead, [experts] are coming to the conclusion that rather than making a long-promised exit, the virus will most likely become a manageable threat that will continue to circulate in the United States for years to come, still causing hospitalizations and deaths but in much smaller numbers.”⁶ In fact, Dr. Fauci said “people should forget about what experts have said in the past, which they said depended on herd immunity, and focus on getting vaccinated or encouraging them to get vaccinated.”

Shifting gears from the herd immunity approach, the Executive Branch began incentivizing Americans to get vaccinated. In April of 2021, the President “announced a tax credit for employers offering vaccine-related paid leave as the White House urge[d] more

¹ World Health Org., Timeline: WHO’s COVID-19 response, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline>

² HHS.gov, “COVID-19 Vaccines,” <https://www.hhs.gov/coronavirus/covid-19-vaccines/index.html>

³ <https://news.harvard.edu/gazette/story/2020/12/anthony-fauci-offers-a-timeline-for-ending-covid-19-pandemic/>

⁴ *Id.*

⁵ <https://thehill.com/changing-america/well-being/prevention-cures/551559-herd-immunization-for-the-coronavirus-is/>

⁶ *Id.*

Americans to seek out Covid shots amid a slight decline in vaccinations.”⁷ Then, in May of 2021, “[t]he U.S. coronavirus vaccination campaign ha[d] reached a tipping point, with supply outstripping demand due to factors including ambivalence or skepticism about the vaccines as well as access issues. In [the spring of 2021], the number of Americans seeking to be vaccinated against COVID-19 dropped by a third, according to the U.S. Centers for Disease Control and Prevention (CDC).”⁸ That forced “public health officials to try new strategies to persuade people to get the shot, efforts that range[d] from creative gimmicks to grassroots outreach resembling get-out-the-vote drives.”⁹

By June of 2021, it was reported that the President was offering more incentives, “[d]angling everything from sports tickets to a free beer, President Joe Biden is looking for that extra something — anything — that will get people to roll up their sleeves for COVID-19 shots when the promise of a life-saving vaccine by itself hasn’t been enough.”¹⁰ At the same time, on June 30, 2021, a Military.com article explained that a “new study of U.S. service members found higher than expected rates of heart inflammation following receipt of COVID-19 vaccines. It’s a finding Defense Department researchers say should call attention to the condition, known as myocarditis, as a potential side effect of the immunizations. In an article published . . . in JAMA Cardiology¹¹, U.S. Army, Navy and Air Force physicians described 23 cases of myocarditis in previously healthy males who developed the condition within four days of receiving a COVID-

⁷ <https://www.cnn.com/2021/04/21/covid-vaccines-biden-announcing-paid-leave-tax-credit-for-businesses.html>

⁸ <https://www.reuters.com/business/healthcare-pharmaceuticals/free-booze-baseball-tickets-offered-us-demand-covid-19-vaccine-drops-2021-05-05/>

⁹ *Id.*

¹⁰ <https://apnews.com/article/coronavirus-pandemic-business-government-and-politics-health-8168ae1c68ca955b620082d862c911ad>

¹¹ https://jamanetwork.com/journals/jamacardiology/fullarticle/2781601?utm_source=silverchair&utm_medium=email&utm_campaign=article_alert-jamacardiology&utm_content=olf&utm_term=062921

19 vaccine . . . All were previously healthy and physically fit and none showed any evidence of having acute COVID-19 illness or any other infection, according to the report.”¹²

But on July 22, 2021, U.S. News and World Report, in an article titled, “Biden Goes Too Far in Assurances About Vaccines,” reported that “President Joe Biden offered an absolute guarantee . . . that people who get their COVID-19 vaccines are completely protected from infection, sickness and death from the coronavirus. The reality is not that cut and dried . . . ‘breakthrough’ infections do occur and the delta variant driving cases among the unvaccinated in the U.S. is not fully understood.”¹³

THE ONSET OF THE COVID-19 VACCINE MANDATES

After assuring the public that the COVID vaccines provided complete protection from the virus, on July 29, 2021, in addition to announcing vaccination mandates for federal employees pursuant to Executive Order 14043 (Federal Employee Mandate) and federal contractors pursuant to Executive Order 14042 (Federal Contractor Mandate), the President announced that he directed the Department of Defense (DoD) to require military service members to receive a COVID-19 vaccination.¹⁴ “[T]he President bluntly argued that if you are unvaccinated, ‘You present a problem to yourself, to your family and to those with whom you work.’”¹⁵ As reported by CNN, the decision “mark[ed] a pivot away from encouraging Americans to get vaccinated in their own time and stepping toward placing the onus on unvaccinated individuals.”¹⁶

¹² <https://www.military.com/daily-news/2021/06/30/dod-confirms-rare-heart-inflammation-cases-linked-covid-19-vaccines.html>

¹³ <https://www.usnews.com/news/politics/articles/2021-07-21/ap-fact-check-biden-inflates-jobs-impact-from-his-policies>

¹⁴ <https://www.cnn.com/2021/07/29/politics/joe-biden-vaccination-requirement-announcement/index.html>

¹⁵ *Id.*

¹⁶ *Id.*

However, just one day later, on July 30, 2021, new data¹⁷ was released by the CDC showing that “vaccinated people infected with the delta variant can carry detectable viral loads similar to those of people who are unvaccinated.”¹⁸ According to an August 2, 2021 article published by the Johns Hopkins Bloomberg School of Public Health, there was also “some question about how cultivatable – or viable – this virus retrieved from vaccinated people actually is.”¹⁹ Looking a few months ahead, on October 29, 2021, a Lancet study²⁰ found even more evidence that “once infected, the vaccinated were just as likely to transmit COVID to people in their own households as the unvaccinated” and that the “asymptomatic infection rate among vaccinated and unvaccinated participants was similar: around 30 percent.”²¹

Despite this developing data, the Biden Administration continued to mandate COVID-19 vaccination, which eventually affected nearly every aspect of the American workforce. In addition to the Federal Employee Mandate, Federal Contractor Mandate, and the military mandates, on November 5, 2021, employers with at least 100 employees were required to implement a mandatory COVID-19 vaccination policy as directed by the OSHA Emergency Temporary Standard.²² However, because the mandates, generally, imposed significant U.S. Constitutional, statutory, and financial, and other harm on citizens, service members, and businesses, 56 lawsuits were filed in federal district courts across the nation.²³ Ultimately, each of the mandates was rescinded.

¹⁷ https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w

¹⁸ <https://publichealth.jhu.edu/2021/new-data-on-covid-19-transmission-by-vaccinated-individuals>

¹⁹ *Id.*

²⁰ [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(21\)00648-4/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00648-4/fulltext)

²¹ <https://www.scientificamerican.com/article/the-risk-of-vaccinated-covid-transmission-is-not-low/>

²² <https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>; 86 Fed. Reg. 61402 (2021)

²³ Exhibit 1, First Liberty Institute Mandate Related Case List, July 26, 2023

A. The DoD’s COVID-19 Vaccine Mandate

On August 24, 2021, Secretary of Defense Lloyd J. Austin issued a memorandum directing the DoD to vaccinate all active-duty and reserve service members against COVID-19.²⁴ The DoD also confirmed that the mandate applied to members of the National Guard.²⁵ The memo made clear that service members who contracted and recovered from COVID-19 must still receive a vaccination. But the memo also exempted from the mandate all service members who are currently participating in a COVID-19 clinical trial—even those given a placebo.

The total number of service members that were required to comply with this mandate was approximately 1,417,800.²⁶

1. The Navy’s COVID-19 Vaccine Mandate

On August 30, 2021, Secretary of the Navy Carlos del Toro issued All Navy (ALNAV) message 062/21, entitled “Department of Navy Mandatory COVID-19 Vaccination Policy.”²⁷ This policy imposed a vaccination mandate for Navy active-duty and reserve personnel, directing them to become vaccinated within 90 and 120 days, respectively, and reiterated the exemption for “[s]ervice [m]embers who are actively participating in COVID-19 clinical trials[.]”²⁸ The total number of Navy service members who were required to comply with the Navy’s COVID-19 vaccination requirement were approximately 438,561.²⁹

²⁴ <https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/MEMORANDUM-FOR-MANDATORY-CORONAVIRUSDISEASE-2019-VACCINATION-OF-DEPARTMENT-OF-DEFENSE-SERVICE-MEMBERS.PDF>

²⁵ <https://www.defense.gov/News/News-Stories/Article/Article/2842978/defense-secretary-has-authority-to-order-mandatory-covid-19-shots/>

²⁶ https://en.wikipedia.org/wiki/United_States_Department_of_Defense

²⁷ https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2021/ALN21062.txt?ver=Vbl_3soAE1K4DhYwqjSGLw%3D%3D

²⁸ *Id.*

²⁹ https://en.wikipedia.org/wiki/United_States_Navy#:~:text=With%20336%2C978%20personnel%20on%20active,b ranches%20in%20terms%20of%20personnel.

In addition to requiring vaccination, the Navy threatened punishment on those who declined the COVID-19 vaccines. On September 24, 2021, the Navy issued “Trident Order #12 – Mandatory Vaccination for COVID-19.”³⁰ In this order, the Navy declared “non-deployable” all SEALs and SWCCs who obtain—or even merely request—a religious accommodation. This disdain for religious service members sharply contrasted with the Navy’s more receptive attitude toward those submitting medical exemption requests; the medical disqualification provision in Manual of the Medical Department (MANMED) 15-105(3)(n)(9) expressly “does not pertain to medical contraindications or allergies to vaccine administration.” Thus, an unvaccinated Special Operations service member who received a medical accommodation could be deployed, but one who merely asked for a religious accommodation was rendered non-deployable.

A few weeks later, on October 13, 2023, the Chief of Naval Operations issued NAVADMIN 225/21, which threatened religious objectors not only with the loss of their careers, but also with potentially crippling debt.³¹ It stated that, “[t]o date, over 98 percent of active-duty U.S. Navy service members have met their readiness responsibility by completing or initiating a COVID-19 vaccination series.”³² NAVADMIN 225/21 further stated that “Navy service members refusing the COVID-19 vaccination, absent a pending or approved exemption, shall be processed for administrative separation.”³³ It also provided that the Navy “may seek recoupment of applicable bonuses, special and incentive pays, and the cost of training and education for service members refusing the vaccine.”³⁴ On its face, this recoupment provision was not forward-looking. Instead, it targeted *past* training costs, bonuses, and payments, even for duties already

³⁰ Exhibit 2 - Navy’s Trident Order #12, September 24, 2021

³¹https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2021/NAV21225.txt?ver=EfkG2psijI2X0IEKSIId_5w%3D%3D#:~:text=This%20NAVADMIN%20announces%20the%20assignment,are%20not%20fully%20vaccinated%20per

³² *Id.*

³³ *Id.*

³⁴ *Id.*

fulfilled. For Special Operations personnel, such as SEALs, this meant that the Navy was threatening to force each of them to pay back over \$1 million.

NAVADMIN 225/21 also authorized temporary reassignment of “Navy service members who refused the COVID-19 vaccine, regardless of exemption status, based on operational readiness or mission requirements.”³⁵ It also mandated that “[c]ommands shall not allow those refusing the vaccine to promote/advance, reenlist, or execute orders, with the exception of separation orders, until the CCDA has completed disposition of their case.”³⁶ And it directed that “commanders and commanding officers shall delay the promotion of any officer refusing the vaccine.”³⁷

On November 15, 2021, the Navy issued another discriminatory policy—NAVADMIN 256/21, “CCDA Guidance to Commanders.”³⁸ This policy states that “Navy service members whose COVID-19 vaccination exemption request is denied are required to receive the COVID-19 vaccine as directed by the exemption adjudicating authority or commence vaccination within 5 days of being notified of the denial, if the exemption adjudicating authority does not specify.”³⁹ NAVADMIN 256/21 also states that Navy service members who continue to refuse vaccination after the expiration of the five days “will be processed for separation and be subject to the other administrative actions described in this NAVADMIN and [NAVADMIN 225/21].”⁴⁰ In addition to immediate processing for separation, the “other administrative actions described in this NAVADMIN” include adverse performance evaluations; denial of promotion or advancement; and, subject to the discretion of the Department of Veterans Affairs (“VA”), the loss of eligibility

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ <https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2021/NAV21256.txt>

³⁹ *Id.*

⁴⁰ *Id.*

for some VA benefits such as the GI Bill, including the transfer of GI Bill benefits to dependents.⁴¹

Because these policies caused significant harm to the Navy's religious service members, First Liberty Institute and Hacker Stephens LLP brought *Navy SEALs 1-26 v. Biden*, Case No. 4:21-cv-01236, in the federal district court of the Northern District of Texas on behalf of 26 U.S. Navy SEALs, 5 Special Warfare Combatant Craft Crewmen, 1 Navy Explosive Ordnance Disposal Technician, and 3 U.S. Navy Divers against President Biden, the DoD, Secretary Lloyd Austin, the Navy, and Secretary Carlos Del Toro.

On November 9, 2021, First Liberty filed a complaint citing violations of the Religious Freedom Restoration Act (RFRA), the First Amendment, and the APA. Shortly thereafter, on November 24, 2021, First Liberty filed a Motion for Preliminary Injunction, seeking immediate relief from the Navy's discriminatory policies. After the matter was fully briefed and a hearing was held, on January 3, 2022, the court concluded that the Plaintiffs were likely to succeed on their substantive claims that the Navy's vaccine mandate violated RFRA and the First Amendment, and that the mandate's permanent medical-disqualification provision failed strict scrutiny. While the government asserted that vaccination was the least restrictive means to achieve its end, the court determined that the government had not demonstrated a compelling interest justifying the substantial burden imposed on the Plaintiffs' religious beliefs. In short, the court granted Plaintiffs the relief they requested, which allowed them to remain employed without being vaccinated.

One of the important factors in the court reaching its decision was that the Navy did not conduct an individualized assessment of the Plaintiffs' RARs to justify the Navy's compelling

⁴¹ *Id.*

interest in the Plaintiffs being vaccinated. Instead, to “adjudicate a religious accommodation request, the Navy used a six-phase, fifty-step process⁴².”⁴³ In the court’s words, “[b]y all accounts, Plaintiffs have safely carried out their jobs during the pandemic.”⁴⁴ And even if the government had a broad compelling interest in widespread vaccination of its force, this goal was achieved because “[a]t least 99.4% of all active-duty Navy servicemembers” were vaccinated at that time, and “[t]he remaining 0.6% [were] unlikely to undermine the Navy’s efforts.”⁴⁵ Moreover, the court noted, “the Navy is willing to grant exemptions for non-religious reasons,” as its “mandate includes carveouts for those participating in clinical trials and those with medical contraindications and allergies to vaccines Because these categories of exempt servicemembers are still deployable, a clinical trial participant who receives a placebo may find himself ill in the high-stakes situation that Defendants fear.”⁴⁶ Taking all relevant facts into consideration, the court determined that the “Navy provides a religious accommodation process, but by all accounts, it is theater.”⁴⁷

After class-wide injunctive relief was issued and extended to the Navy Class on March 28, 2022, as of March 31, 2022, the Navy reported 89,791 total cases of COVID-19, 2 hospitalizations, and 17 deaths, as well as 13 approved permanent medical exemptions, 207 approved temporary medical exemptions, and 0 approved religious accommodation requests.⁴⁸

2. The Department of the Air Force’s COVID-19 Vaccine Mandate

On September 3, 2021, Secretary Frank Kendall issued a memorandum to all Air Force Commanders implementing the Department of the Air Force’s COVID-19 Vaccine Mandate. The

⁴² Exhibit 3 – Navy’s 50 Step SOP

⁴³ Exhibit 4 – *Navy SEALs 1-26 v. Biden*, Preliminary Injunction Order

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Exhibit 5 – U.S. Navy March 31, 2022, COVID-19 Update

Air Force COVID-19 Vaccine Mandate directed all Air Force commanders to take “all steps necessary to ensure all uniformed Airmen and Guardians receive the COVID-19 vaccine.” It further directed that, unless exempted, Active-Duty Airmen and Guardians must be fully vaccinated within 60 days, by November 2, 2021, and Ready Reserve, including National Guard, Airmen and Guardians must be fully vaccinated within 90 days, by December 2, 2021. The total number of Airmen who were required to comply with the COVID-19 vaccination requirement were approximately 399,131.⁴⁹

Because Department of the Air Force service members were experiencing similar discriminatory treatment by the DoD and the Department of the Air Force for requesting to be religiously accommodated from the COVID-19 vaccine requirements, a class action complaint was filed in *Doster v. Kendall*, Case No. 1:22-cv-84, on February 16, 2022. Similar to the issues raised in the *Navy SEALs 1-26* case, the *Doster* Plaintiffs cited to the government’s violations of RFRA and the First Amendment and requested injunctive relief to halt the ongoing violations of law. On February 22, 2022, in a request to obtain immediate relief, the Plaintiffs filed an Emergency Motion for a Temporary Restraining Order and Motion for Preliminary Injunction, which was granted on March 31, 2022. This relief was eventually extended to the Department of the Air Force class members on July 14, 2022 and allowed the class members to remain employed without the vaccine.

Before the *Doster* class was certified, First Liberty and Schaerr Jaffe LLP filed a class action lawsuit, *Spence v. Austin*, Case. No. 4:22-cv-00453, on May 27, 2022. The case is comprised of nine Air Force officers who each have a religious objection to taking a COVID-19 vaccine. The harms each of the Plaintiffs experienced in that case ranged from loss of

⁴⁹ https://en.wikipedia.org/wiki/United_States_Department_of_the_Air_Force

promotions and the threat of imminent loss of retirement to loss of flying privileges.⁵⁰ On July 14, 2022, that case became part of the *Doster* lawsuit once the *Doster* class was certified.

As of February 16, 2022, according to the Department of the Air Force's own data, there were 90,116 active duty and reserve cases of COVID-19, 53 hospitalizations and 15 deaths from the virus, with 96.1% of the total force fully vaccinated, 1,393 approved medical exemptions, 12,623 requests for religious accommodation submitted, and only 1 religious accommodation request was fully approved.⁵¹

B. The Federal Contractor Mandate (EO 14042)

On September 9, 2021, President Biden issued EO 14042, which required that “Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments . . . include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting. This clause shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument.”⁵²

⁵⁰ Exhibit 6 – *Spence v. Austin* Plaintiffs Declarations.

⁵¹ <https://www.af.mil/News/Article-Display/Article/2919591/daf-covid-19-statistics-february-2022/>

⁵² <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>

On December 7, 2021, the U.S. District for the Southern District of Georgia, in *Georgia v. Biden*, Case No. 1:21-cv-163, issued an injunction because the court found that the states could likely prove that Congress did not clearly authorize President Biden to issue EO 14042 under the Federal Property and Administrative Services Act (FPASA).⁵³ In the court’s opinion, EO 14042 “goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting” and practically operates as a regulation of public health, which is not clearly authorized under FPASA.⁵⁴ The court determined that states could likely prove that EO 14042 does not have a sufficient nexus to the purposes of FPASA and thus does not fall within the authority granted to the President under FPASA. Additionally, the time and effort federal contractors spent on implementing a vaccine mandate in the past (and will spend in the future) constitute irreparable compliance costs resulting from EO 14042. And in balancing the harms, the court found that enjoining EO 14042 “would, essentially, do nothing more than maintain the status quo; entities will still be free to encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated. In contrast, declining to issue a preliminary injunction would force Plaintiffs to comply with the mandate, requiring them to make decisions which would significantly alter their ability to perform federal contract work which is critical to their operations.”⁵⁵

This ruling impacted over 5,138 government contractors currently employed in the United States.⁵⁶

⁵³ Exhibit 7 – *Georgia v. Biden*, Preliminary Injunction Order

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ <https://www.zippia.com/government-contractor-jobs/demographics/>

C. The Federal Employee Mandate (EO 14043)

On September 9, 2021, President Biden issued Executive Order 14043, which generally required all federal employees to be vaccinated. Employees who did not comply would face termination.

Shortly thereafter, on December 21, 2021, Feds for Medical Freedom, a non-profit organization with over 6,000 members employed by numerous federal agencies and contractors, along with a chapter of the American Federation of Government Employees and more than 50 individual Plaintiffs filed a complaint against President Biden and other Executive Branch officials challenging the Federal Employee Mandate and Federal Contractor Mandate.⁵⁷ The next day, the Plaintiffs filed a Motion for Preliminary Injunction requesting the court to enjoin both mandates. In their filings, Plaintiffs raised several constitutional and statutory claims. First, they argued that the President did not have inherent Article II authority to issue either mandate, and that any purported congressional delegation of such power violated either the major questions doctrine or the non-delegation doctrine. Second, they claimed both mandates were arbitrary, capricious, and otherwise not in accordance with law under the Administrative Procedure Act (“APA”), and that the contractor mandate violated the APA because it was not in accordance with law. Finally, they sought relief under the Declaratory Judgment Act.

While the district court declined to enjoin the contractor mandate because it was already the subject of a nationwide injunction, on January 21, 2022, it enjoined the Federal Employee Mandate. Although the government appealed that injunction, on March 23, 2021, the Fifth Circuit affirmed the district court’s ruling. This ruling impacted 2,8790,000 federal civilian employees.⁵⁸

⁵⁷ *Feds for Medical Freedom v. Biden*, Case No. 3:21-cv-356

⁵⁸ <https://www.statista.com/statistics/204535/number-of-governmental-employees-in-the-us/>

D. The OSHA Mandate

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its Emergency Temporary Standard (ETS) that applied to roughly 84 million workers, covering virtually all employers with at least 100 employees.⁵⁹ The ETS stated that covered employers must “develop, implement, and enforce a mandatory COVID–19 vaccination policy,”⁶⁰ and were required to verify the vaccination status of each employee and maintain proof of it.⁶¹ The ETS contained an “exception” for employers that required unvaccinated workers to “undergo [weekly] COVID-19 testing and wear a face covering at work in lieu of vaccination.”⁶² Unvaccinated employees who did not comply with OSHA’s rule were required to be “removed from the workplace.”⁶³ And employers who committed violations faced hefty fines: up to \$13,653 for a standard violation, and up to \$136,532 for a willful one.⁶⁴

After OSHA published its vaccine mandate, scores of parties—including States, businesses, trade groups, and nonprofit organizations—filed petitions for review, with at least one petition arriving in each regional Court of Appeals. The Fifth Circuit initially entered a stay preventing OSHA’s rule from taking effect.⁶⁵ But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA’s rule to proceed.⁶⁶ However, in response to an emergency petition, the Supreme Court determined that the ETS was no

⁵⁹ <https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>; 86 Fed. Reg. 61402 (2021).

⁶⁰ *Id.* at 61402.

⁶¹ *Id.* at 61552.

⁶² *Id.* at 61402.

⁶³ *Id.* at 61532.

⁶⁴ 29 CFR §1903.15(d) (2021).

⁶⁵ *BST Holdings, L.L.C. v. Occupational Safety and Health Admin.*, 17 F. 4th 604, 609 (5th Cir. 2021)

⁶⁶ *In re MCP No. 165*, 20 F.4th 264 (6th Cir. 2021)

“‘everyday exercise of federal power.’ It is instead a significant encroachment into the lives—and health—of a vast number of employees.”⁶⁷

Importantly, the majority Court noted that “in its half century of existence, [OSHA] has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.”⁶⁸

SERVICE MEMBERS DISCRIMINATED AGAINST FOR LAWFULLY OBJECTING TO REQUIRED VACCINATION

As previously stated, service members across the military branches were discriminated against after exercising their religious liberty rights in response to the COVID-19 vaccine mandate. In the *Navy SEALs* case, some of the most common examples of the coercion and punishment First Liberty’s clients suffered are as follows:

A. Navy SEAL 26

Navy SEAL 26 was denied permission to travel to a treatment program for Traumatic Brain Injury, which the court called an “egregious example” of harm suffered by Plaintiffs. SEAL 26’s request to travel to obtain treatment was made before the injunction was issued, and on January 3, 2022, the same day the court issued the preliminary injunction, SEAL 26’s request was officially denied.⁶⁹ At that time, an officer in his chain of command began trying to obtain approval of leave for SEAL 26 so that he could at least attend treatment on his own dime. This is precisely what SEAL 3, also a Plaintiff, had to do, as he testified at the preliminary-injunction hearing. Ultimately, SEAL 26 was denied the ability to travel to a Traumatic Brain Injury

⁶⁷ *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661 (2022)

⁶⁸ *Id.*

⁶⁹ Exhibit 8 - SEAL 26 Declaration

treatment program twice (both prior to and after the issuance of the injunction), even to receive the treatment out of his own pocket. This action clearly violated the injunction's prohibition on "adverse action" and is all the more egregious given that this treatment was necessary for injuries sustained during his service.

B. Navy SEAL 21

Plaintiff Navy SEAL 21 was kicked out of his platoon and forced to turn in his gear prior to the issuance of the injunction. He was unable to participate in training, which meant he could not deploy.⁷⁰ SEAL 21 was explicitly told—after the injunction was issued—that he could not take the chief examination (a requirement for promotion) as scheduled because of NAVADMIN 225/21 paragraph 7.D, because he was "refusing the vaccine." Subsequently, he was permitted to take the chief examination "in case things get over turned." When SEAL 21 took his exam on January 24, 2022, there was a notation at the top of his paperwork stating that he was unable to promote due to NAVADMIN 225/21. Additionally, SEAL 21's work duties (along with Plaintiff SEAL 25 and another SEAL with a pending Religious Accommodation Request (RAR)) were to pick up trash around the base and report what he picked up to his chief.

C. Navy SEAL 13

Navy SEAL 13 was removed from a four-month course (despite completing over half) for submitting a RAR.⁷¹ The course was for a critical qualification for being at his current command and for being in the position of Lead Petty Officer (LPO), which he was at the time. SEAL 13 was subsequently removed from that position and replaced with another person who didn't have the course qualification SEAL 13 would have had if he had not been removed from the course.

⁷⁰ Exhibit 9 – SEAL 21 Declaration

⁷¹ Exhibit 10 – SEAL 13 Declaration

SEAL 13 took the chief examination on January 26, 2022, but was ineligible for promotion because he was removed from his leadership position for submitting his RAR.

D. Navy SEAL 22

Navy SEAL 22 was supposed to transfer from a training detachment to a SEAL Team for a milestone position as a platoon chief in October 2021.⁷² But because of his pending RAR, he was not allowed to formally transfer to the Team. As a result, he lost his position as SEAL Team 7 Alpha platoon chief. On January 28, 2022, SEAL 22 was told by his command that he was not permitted to attend a training course along with the other members of his training cell because of his pending RAR. NAVADMIN 256/21 denied educational opportunities to vaccine refusers, but SEAL 22 is not a “refuser” because he had a pending RAR.

Unfortunately, these types of harms were not limited to the *Navy SEALs* Plaintiffs. They also extended to members of the Navy Class who were threatened with having to repay the cost of schooling and already earned bonuses⁷³ and being forced to live in deplorable conditions.⁷⁴ Air Force service members in the *Spence* case similarly experienced harm by being grounded from flying duties⁷⁵ while pilots with medical reasons for refusing the vaccine received a one-year medical exemption that allowed a full return to regular pilot duties.⁷⁶

THE DOD WAS NONCOMPLIANT WITH ITS POLICY ON PROCESSING RELIGIOUS ACCOMODATION REQUESTS

The DoD’s policy for processing religious accommodation requests is found in DoD Instruction 1300.17, *Religious Liberty in the Military Services*, 1 September 2020.⁷⁷ The relevant

⁷² Exhibit 11 – SEAL 22 Declaration

⁷³ Exhibit 12 – Lieutenant Commander (Select) Levi Beaird Declaration

⁷⁴ Exhibit 13 – Petty Officer Third Class Faith Mack Declaration

⁷⁵ <https://www.foxnews.com/politics/biden-declared-pandemic-over-unvaxxed-air-force-pilots-still-grounded>

⁷⁶ Exhibit 14 – Lieutenant Colonel Michael McCoy Declaration

⁷⁷ <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf>

purpose of the instruction is to “[e]stablish[] DoD policy in furtherance of the Free Exercise Clause of the First Amendment to the Constitution of the United States, recognizing that Service members have the right to observe the tenets of their religion, or to observe no religion at all,” “[e]stablish[] DoD policy on the accommodation of individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs), which do not have an adverse impact on military readiness, unit cohesion, good order and discipline, or health and safety,” and “[i]mplements requirements in Section 2000bb-1 of Title 42, United States Code (U.S.C), also known as ‘The Religious Freedom Restoration Act’ (RFRA), and other laws applicable to the accommodation of religious practices for DoD to provide, in accordance with the RFRA, that DoD Components will normally accommodate practices of a Service member based on a sincerely held religious belief.”⁷⁸

While the Secretary of Defense delegated his authority to act on requests for the accommodation of religious practices to the Secretaries overseeing the individual military branches, Section 3 of the instruction explains how accommodation requests should be processed. However, as this process related to the COVID-19 vaccine mandate, on June 2, 2022, the Inspector General (IG) for the DoD informed the Secretary of Defense of “potential noncompliance with standards for reviewing and documenting the denial of religious accommodation requests of Service members identified through complaints submitted to my office . . . We found a trend of generalized assessments rather than individualized assessment that is required by Federal law and DoD and Military service policies . . . The denial memorandums we reviewed generally did not reflect an individualized analysis, demonstrating that the Senior Military Official considered the full range of facts and circumstances relevant to the particular

⁷⁸ *Id.*

religious accommodation request . . . Additionally, the volume and rate at which decisions were made to deny requests is concerning. The appeal authorities of the Services we reviewed indicated that an average of 50 denials per day were processed over a 90-day period. Assuming a 10-hour work day with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.”⁷⁹

The DoD IG’s findings are consistent with the court’s determination in the *Navy SEALs* case that the Navy’s religious accommodation process was “theater.”

THE DOD HAD NO DESIRE TO RESCIND THE COVID-19 MANDATE

In December 2022, as the legislative text for the 2023 NDAA was being finalized, the National Security Council coordinator for strategic communications, John Kirby, announced “We continue to believe that repealing the vaccine mandate is a mistake. Making sure our troops are ready to defend this country and prepared to do so that remains the President’s priority and the vaccine requirement for Covid does just that.”⁸⁰ This statement was made after Mr. Kirby appeared for an interview on Fox and Friends on October 4, 2022, where he continued to support the COVID-19 vaccine requirement, stating “[p]art of being ready is being healthy . . . and not having the ability to infect your unit and make their unit readiness any worse than it is.”⁸¹ Yet, during the interview, he announced that he was working from home, as he was “wrapping up [his] own bout with COVID,” despite being “double boosted.”⁸² When the host of the show then said “to invest in our people and then train them and to dismiss them for an experimental vaccine is folly when every one of your branches can’t recruit their threshold, yet you’re kicking out

⁷⁹ Exhibit 15 – DoD IG Report, September 2, 2022

⁸⁰ <https://www.cnn.com/2022/12/07/politics/biden-military-covid-mandate-ndaa/index.html>

⁸¹ <https://www.foxnews.com/video/6313240705112>

⁸² *Id.*

good men and women, how do you explain that,” and that “it’s a risk to our national security,” Mr. Kirby answered, “Yes, it’s a tough recruiting environment . . . but this is a valid military requirement.”⁸³

Secretary of the Navy, Carlos Del Toro also responded to the news of Congress’s proposal to end the DoD’s vaccine mandate. In December, he “spoke against removing the mandate at a Navy League event, raising concerns such as what happens to sailors who need to go to countries with strict vaccine requirements. Congress needs to understand the secondhand consequences of their decisions, the Navy Secretary said. ‘But unquestionably it’ll create almost two classes of citizens in our services,’ Del Toro said. ‘Those that can’t deploy and those that can deploy. And that creates all sorts of problems.’”⁸⁴ This was the view of senior military leadership despite lower-level commanders supporting subordinates who submitted RARs and determining that no compelling interest existed for requiring vaccination and denying RARs.⁸⁵

THE HARM IS STILL ONGOING

While the Secretary of Defense rescinded the August 24, 2021 COVID-19 vaccination mandate pursuant to Section 525 of the NDAA,⁸⁶ which states, “Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19 pursuant to the memorandum dated August 24, 2021, regarding ‘Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members’,”⁸⁷ the harm is still ongoing for service members.

⁸³ *Id.*

⁸⁴ <https://news.usni.org/2022/12/07/pentagon-unclear-how-military-would-handle-end-of-mandatory-covid-19-vaccines>

⁸⁵ Exhibits 16 and 6

⁸⁶ <https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-ON-RESCISSION-OF-CORONAVIRUS-DISEASE-2019-VACCINATION-REQUIREMENTS-FOR-MEMBERS-OF-THE-ARMED-FORCES.PDF>

⁸⁷ <https://www.congress.gov/bill/117th-congress/house-bill/7776/text>

After nearly 33 total lawsuits were filed by service members against the DoD and their respective individual armed services and Secretaries,⁸⁸ those who sought a religious accommodation from their respective branch of service are now one to three years behind their peers as a result of being removed from their duties. As a result, many will be unable to promote and are faced with the future prospect of losing their careers. Considering a total of 19,460 service members remained unvaccinated as of October 4, 2022,⁸⁹ this means we could lose millions in training costs, and hundreds of thousands of years of invaluable institutional knowledge. At a time when young Americans have no desire to join the military⁹⁰ and military members are telling their children not to join the military,⁹¹ we should consider this a significant national security crisis.

⁸⁸ Exhibit 1 – First Liberty Institute Mandate Related Case List, July 26, 2023

⁸⁹ <https://www.foxnews.com/video/6313240705112>

⁹⁰ <https://abcnews.go.com/Politics/military-struggling-find-troops-fewer-young-americans-serve/story?id=86067103#:~:text=Only%209%25%20of%20young%20people,PTSD%20or%20other%20psychological%20problems.>

⁹¹ <https://www.wsj.com/articles/military-recruiting-crisis-veterans-dont-want-their-children-to-join-510e1a25>

EXHIBIT 1

Exhibit 1

CASE LIST

Military: Religious

1. *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822 (N.D. Tex. 2022): Preliminary injunction granted for Navy SEALs as they were likely to succeed on claim that vaccine mandate violated RFRA and First Amendment. Class-wide relief was issued on March 28, 2023.
2. *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022): Government filed for a stay of an injunction granted against the vaccine mandate pending appeal. The Court denied the motion because that government was unable to demonstrate paramount interests in vaccinating the plaintiffs.
3. *U.S. Navy SEALs 1-26 v. Biden*, 72 F. 4th 666 (5th Cir. 2023): Navy servicemembers challenged mandate on RFRA and First Amendment grounds. The Navy had complied with the 2023 NDAA. As such, the court dismissed the appeal and remanded the case to the district court.
4. *Navy SEAL 1 v. Austin*, 600 F. Supp. 3d 1 (D.D.C. 2022), *vacated*, No. 22-5114, 2023 U.S. App. LEXIS 5843 (D.C. Cir. Mar. 10, 2023): Lower court's denial of PI dismissed as moot. Plaintiff Navy Seal had alleged violation of the Free Exercise Clause. The lower court weighed the alleged violation against the Commander-in-Chief's broad authority and denied PI.
5. *Knick v. Austin*, No. 22-1267 (BAH), 2022 WL 2157066 (D.D.C. June. 15, 2022): Plaintiff Air Force captain challenged mandates on RFRA, First Amendment, and Fifth Amendment grounds. PI and TRO were denied, the court "declin[ing] to meddle prematurely in the military's decision-making."
6. *Bongiovanni v. Austin*, No. 3:22-cv-580-MMH-MCR, 2023 WL 4352445 (M.D. Fla. July 5, 2023): Navy members challenged mandate and policy of systematically denying religious accommodations under RFRA and First Amendment. Court found case moot in light of NDAA amendment and denied request for damages despite mootness.
7. *Davis v. Austin*, No. 3:22-cv-237-MMH-MCR, 2023 U.S. Dist. LEXIS 115152 (M.D. Fla. July 5, 2023): Air Force and Space Force plaintiffs denied religious accommodations sought relief based on RFRA, First Amendment, and Fifth Amendment. The court found the case moot in light of the NDAA amendment.
8. *Roth v. Austin*, 603 F. Supp. 3d 741 (D. Neb. 2022) (aff'd by *Doster v. Kendall*, 54 F.4th 398 (6th Cir. 2022) and 62 F.4th 1114 (8th Cir. 2023)): Thirty-six Air Force active and reserve personnel and Air National Guard plaintiffs challenged mandate on RFRA and

First Amendment grounds. PI denied because plaintiffs were not likely to succeed under RFRA and, therefore, the broader First Amendment.

9. *Colonel Fin. Mgmt. Officer v. Austin*, No. 8:21-cv-2429-SDM-TGW, 2023 WL 2764767 (M.D. Fla. Apr. 3, 2023): Navy and Marine servicemembers challenged federal mandate under RFRA; case was found to be moot in light of NDAA amendment. On August 18, 2022, the court granted class-wide injunctive relief to members of the Marine Corps. class.
10. *Creaghan v. Austin*, 602 F. Supp. 3d 131 (D.D.C. 2022), *vacated and remanded sub nom. Navy SEAL I v. Austin*, No. 22-5114, 2023 WL 2482927: Space Force Captain sought religious exemption. PI and TRO were denied, finding that public and military interest “outweigh Plaintiff’s religious liberty interest.”
11. *Air Force Officer v. Austin*, No. 5:22-cv-00009-TES, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022), *aff’d in part*, No. 5:22-cv-00009-TES, 2022 WL 1240856 (M.D. Ga. Apr. 27, 2022): Earlier case granted PI because the Air Force’s mandate and inadequate religious accommodation program likely violated plaintiff’s First Amendment and RFRA rights. The later case preserved the PI and extended it to new class members.
12. *Short v. Berger*, 593 F. Supp. 3d 944 (C.D. Cal. 2022), appeal dismissed, No. 22-55339, 2022 WL 2421096 (9th Cir. May 17, 2022): PI denied and TRO vacated because Marine provided only conjecture that engaging in a separation proceeding would be futile. The court held that since the military may prohibit yarmulkes, preventing the military from prohibiting vaccines would disproportionately favor one religious belief.
13. *Miller v. Austin*, 622 F. Supp. 3d 1105 (D. Wyo. 2022): Plaintiff Air Force sergeants sued on RFRA and First Amendment grounds. PI and TRO denied; plaintiffs did not show they suffered actual, concrete injury.
14. *Navy SEAL I v. Austin*, 599 F. Supp. 3d 1233 (M.D. Fla. 2022): PI granted in part: defendants were enjoined from enforcing mandate against USMC captain, from separating him from the Marine Corps, and from retaliatory action against him for requesting religious accommodation.
15. *Navy SEAL I v. Biden*, 574 F. Supp. 3d 1124 (M.D. Fla. 2021): Plaintiffs from each branch except Space Force challenged the August 2021 DoD directive and Executive Order 14042 on religious grounds. The court found no standing to challenge the EO. The court did find suggestive but insufficient evidence to substantiate plaintiffs’ claims of anti-religious bias. PI and TRO denied as to RFRA and Free Exercise claims because plaintiffs failed to show that the military will require a servicemember to receive an emergency vaccine not approved by the FDA.
16. *Crosby v. Austin*, No. 8:21-cv-2730-TPB-CPT, 2022 WL 2291244 (M.D. Fla. June 24, 2022); No. 8:21-cv-2730-TPB-CPT, 2022 WL 603784 (M.D. Fla. Mar. 1, 2022): Plaintiff Army Reserve Sergeant Major agreed to Comirnaty vaccine but not BioNTech. His PI

was denied because he was found unlikely to prevail. Plaintiff also challenged the mandate under an informed consent provision, but the court found that provision did not confer a private cause of action. In June 2022, Plaintiff Army NCO challenged Army's mandate based on informed consent, APA, RFRA, and First Amendment. The court dismissed all except plaintiff's religious claims.

17. *Wiese v. Biden*, No. 22-cv-1458-SMY, 2022 U.S. DIST. LEXIS 124202 (S.D. Ill. July 13, 2022): Plaintiff Air Force Lieutenant challenged mandate on constitutional and RFRA grounds. Plaintiff was ordered to receive the vaccine within five days or request to separate or retire within five months from her final appeal. The court denied plaintiff's emergency motion for TRO because it found no immediacy to justify the motion.
18. *Hyatt v. Austin*, No. 8:22-cv-1188-TPB-JSS, 2022 WL 2291660 (M.D. Fla. June 24, 2022): Plaintiff Army NCO challenged Army's mandate based on informed consent, APA, RFRA, and First Amendment. The court dismissed all except plaintiff's religious claims.
19. *Hyatt and Crosby II* were subsequently transferred to a M.D. Fla. judge before whom a related class action was pending.
20. *Schelske v. Austin*, No. 6:22-CV-049-H, 2022 WL 17835506 (N.D. Tex. Dec. 21, 2022): Challenge brought against Army's vaccine mandate. Court issued memorandum opinion granting preliminary injunction holding that Army had entered no evidence demonstrating a compelling interest. Case was dismissed on RFRA grounds.
21. *Poffenbarger v. Kendall*, 588 F. Supp. 3d 770 (S.D. Ohio 2022), *appeal dismissed*, No. 22-3413, 2022 WL 3029325 (6th Cir. June 30, 2022): Motion for preliminary injunction filed against Air Force's vaccine mandate on RFRA and First Amendment grounds. Court granted in part a preliminary injunction against Air Force precluding them from enforcing any adverse action against plaintiff for refusing to take vaccine.
22. *Crocker v. Austin*, No. 22-0757, 2023 WL 4143224 (W.D. La. June 22, 2023): Air Force's motion to dismiss challenge to vaccine mandate by reserve officer as moot was granted. This was the result of the Air Force's lifting of the vaccine mandate. Suit was brought on RFRA and First Amendment grounds.
23. *Doster v. Kendall*, 54 F.4th 398 (6th Cir. 2022): Upholding the grant of a preliminary injunction against Air Force's vaccine mandate based on RFRA. This was based on the Air Force's numerous grants of medical exemptions while only 135 religious exemptions of the 10,000 requested. Those who were given the exemption already had plans to leave the military as well. In the same litigation at the lower court, that court found that plaintiffs' challenge to Air Force's vaccine mandate constituted a substantial burden on claimants' free exercise. Additionally, the government relied on broadly formulated interests as justification for the mandate, which RFRA prevents. *See Doster v. Kendall*, 596 F. Supp. 3d 995 (S.D. Ohio 2022). The Sixth Circuit also refused to grant Air Force's motion for emergency stay of class action lawsuit because it had not demonstrated a

likelihood of success on the merits. *Doster v. Kendall*, 48 F.4th 608 (6th Cir. 2022). Moreover, the court also held that claims against Air Force were ripe under the First Amendment. Defendant's motion to dismiss at the outset of the litigation was denied because plaintiffs would have suffered "significant hardship" if the Court did not review the issue. *Doster v. Kendall*, 615 F. Supp. 3d 741 (S.D. Ohio 2022).

24. *Bazzrea v. Mayorkas*, No. 3:22-cv-265, 2023 U.S. Dist. LEXIS 101876 (S.D. Tex. June 12, 2023): Plaintiffs alleged that Coast Guard's vaccine mandate violated RFRA, First Amendment, Fifth Amendment Due Process, and APA. Court dismissed the claims as moot because of the Coast Guard's lifting of its vaccine mandate.
25. *Vance v. Wormouth*, No. 3:21-CV-730-CRS, 2022 WL 1094665 (W.D. Ky. Apr. 12, 2022): Army's motion to dismiss granted because plaintiff had filed for a religious accommodation from all vaccines, but the Army, at the time of filing, had not made a decision regarding whether the accommodation request would be granted with respect to the COVID-19 vaccine. As such, the claim was not ripe and therefore dismissed on a 12(b)(6) motion.
26. *Children's Health Def. v. United States Food & Drug Admin.*, No. 21-6203, 2022 WL 2704554 (6th Cir. July 12, 2022), *cert. denied sub nom. Children's Health Def. v. Food & Drug Admin.*, 215 L. Ed. 2d 51 (2023): This is an appeal of a district court's dismissal of the original action seeking a stay of FDA's licensure of Pfizer's Comirnaty COVID-19 vaccine. Plaintiffs also opposed the mandate on religious grounds.
27. *U.S. Navy SEALs v. Austin*, 594 F. Supp. 3d 767 (N.D. Tex. 2022): Plaintiff's motion for class certification was granted under Fed. R. Civ. P. 23(a). The alleged injury arose from violations of constitutional rights and a denial of religious accommodations for vaccine mandate.
28. *Schneider v. Austin*, No. 3:22-cv-00293, 2022 U.S. Dist. LEXIS 161063 (S.D. Tex. Sept. 7, 2022): Defendant's motion to stay an injunction pending a ruling in another case was granted. This case involved a class action of a number of Marines opposing the mandate on religious grounds.
29. *Children's Health Def. v. FDA*, 573 F. Supp. 3d 1234 (E.D. Tenn. 2021): This case was dismissed due to lack of standing. Plaintiffs presented declarations from several of its members who were current or active military duty opposing the vaccination on numerous grounds, including religion. However, the case was dismissed for lack of standing because it was the actions of the military, not the FDA, that caused the complaint to be filed. As such, the injury was not redressable.

Military: Other

1. *Coker v. Austin*, No. 3:21-cv-1211-AW-HTC, 2022 WL 19333274 (N.D. Fla. Nov. 7, 2022): Plaintiff Air Force members argued that military has no right to require vaccines and mandate is arbitrary and capricious under the APA. The court found that plaintiffs alleged a plausible claim that the Armed Services Guidance policies requiring vaccines are facially invalid under informed consent rights. Government's other motions to dismiss were granted with leave to amend.
2. *Church v. Biden*, 573 F. Supp. 3d 118 (D.D.C 2021): Active-duty Marines challenged vaccine mandate. PI and TRO denied partly because servicemembers' request for exemptions were still pending, making their claims not yet ripe.
3. *Doe v. Austin*, 572 F. Supp. 3d 1224 (N.D. Fla. 2021): PI denied because servicemembers challenging policy did not show a high likelihood of success.
4. *Robert v. Austin*, No. 22-1032, 2023 WL 4361082 (10th Cir. July 6, 2023): Plaintiffs Army and USMC Staff Sergeants sued DoD, challenging mandate. The lower court had declined to certify a class. Government's motion to dismiss was granted, PI was denied, and appeals were found to be moot.
5. *Robert v. Austin*, No. 21-cv-02228-RM, 2021 WL 8444665 (D. Colo. Sept. 1, 2021): Army and USMC Staff Sergeants challenged mandate based on naturally acquired immunity. TRO was denied.
6. *Oklahoma v. Biden*, 584 F. Supp. 3d 1034 (W.D. Okla. 2022); 577 F. Supp. 3d 1245 (W.D. Okla. 2021): Oklahoma governor sought to enjoin DoD from enforcing its mandate as to the Oklahoma National Guard and Air National Guard. PI denied: the court "quite readily" found the mandate valid and enforceable. Oklahoma did not show that EO 14043 interfered with any state law or caused economic injury that would provide the requisite standing. Oklahoma did show injury-in-fact, but not satisfactorily for standing purposes. Later, Guard members sought permission for sixteen members to proceed anonymously. Motion for protective order was denied.
7. *Guetlein v. United States Merch. Marine Acad.*, 577 F. Supp. 3d 96 (E.D.N.Y. 2021): Held that plaintiff students were not entitled to a preliminary injunction against the COVID-19 vaccine mandate because there was no demonstration of likelihood of success on the merits. The court found that there was no jurisdiction under § 1983 or 28 U.S.C.S. §§1331, 1343, which was a large basis upon which the motion for preliminary injunction was denied.
8. *Abbott v. Biden*, 70 F.4th 817 (5th Cir. 2023): Court held that district court erred in denying preliminary injunction for members of Texas militia. The reason was because the

district court only considered the likelihood of success on the merits and not the other factors for preliminary injunction.

9. *Abbott v. Biden*, 608 F. Supp. 3d 467 (E.D. Tex. June 24, 2022), *rev'd*, 70 F.4th 817 (5th Cir. 2022): This is the district court's ruling that denied a preliminary injunction against the National Guard from imposing their vaccination mandate because the plaintiffs had not demonstrated a likelihood of success on the merits, which is the reason the court was reversed by the Fifth Circuit.
10. *Alvarado v. Austin*, No. 1:22-cv-876, 2023 U.S. Dist. LEXIS 27657 (E.D. Va. Feb. 17, 2023): This ruling upholds the original dismissal of the action challenging the military's vaccine mandate because the National Defense Authorization Act for Fiscal Year 2023 did not perpetuate a change in law that was relevant to the original grounds upon which the action was dismissed, which was for want of subject matter jurisdiction. The original action was brought by military chaplains against the Department of Defense.

OSHA

1. *BST Holdings, L.L.C v. OSHA*, 17 F.4th 604 (5th Cir. 2021): Petitioners, a business of more than 100 people, to whom OSHA's vaccine mandate applied, sought a stay of enforcement against the mandate. The court granted the stay on the grounds that the mandate was "staggeringly overbroad," under-inclusive, and likely outside the scope of the Commerce Clause's grant of authority due to its regulation of noneconomic inactivity.
2. *In re MCP No. 165*, 20 F.4th 264 (6th Cir. 2021): This was the litigation challenging the vaccine mandate issued by the Secretary of Labor. Appellants sought an initial hearing *en banc*, which the Sixth Circuit denied by an 8-8 vote. Then, a three-judge panel dissolved the stay issued by the Fifth Circuit in *BST Holdings*. That ruling was appealed, which resulted in *Nat'l Fed'n of Indep. Bus.*
3. *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661 (2022): A conglomeration of independent businesses with more than 100 employees brought a challenge against the vaccine mandate for private businesses. The Supreme Court held that the Secretary of Labor lacked the statutory authority to issue a vaccine mandate because the Act concerned workplace hazards specifically, not universal hazards faced by Americans whether they were at work or not.
 - This is the culmination of nationwide litigation challenging the mandate. All of the United States Circuit Courts received a petition for review. Therefore, pursuant to 28 U.S.C. § 2112(a), these cases were consolidated into the Sixth Circuit.

EO 14043

1. *Feds for Med. Freedom v. Biden*, 63 F.4 366 (5th Cir. 2023): Organization representing over 6,000 federal employees and individual employees brought action alleging that President exceeded his authority when he issued executive order mandating COVID-19 vaccination for all executive branch employees, subject to medical and religious exceptions. The United States District Court for the Southern District of Texas, granted plaintiffs' motion for preliminary injunction, and United States appealed. The Court of Appeals vacated and remanded. Rehearing en banc was granted, and the district court's order was affirmed.
2. *Calderwood v. America*, 623 F. Supp. 3d 1260 (N.D. Ala. 2022): Two federal civilian employees, a federal contractor's employee, and a physician challenged the constitutionality of EO 14042 and 14043. The court held that it lacked jurisdiction. Also, at the time, "nationwide injunctions" prevented the government from enforcing the vaccine mandate, rendering plaintiffs' claim against that mandate not justiciable.
3. *AFGE Loc. 2586 v. Biden*, 616 F. Supp. 3d 1275 (W.D. Okla. 2022): Plaintiff labor union representing federal civil employees with DoD challenged enforcement of EO 14043. The court held that it lacked jurisdiction because the claims were precluded by the Civil Service Reform Act.
4. *See Oklahoma v. Biden*, 584 F. Supp. 3d 1034 (W.D. Okla. 2022); 577 F. Supp. 3d 1245 (W.D. Okla. 2021).

EO 14042

1. *Connor v. Biden*, No. 6:21-CV-074-H, 2021 U.S. Dist. LEXIS 252728 (N.D. Tex. Dec. 28, 2021): This concerns a challenge brought by employees of a federal contractor to seek an injunction against the enforcement of the contractor vaccine mandate. Because, at the time this case was filed, a Georgia district court had already issued a nationwide injunction against the mandate, the Court *sua sponte* stayed the action pending further proceedings in the Georgia district court, the Eleventh Circuit, or the U.S. Supreme Court.
2. *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022): A challenge was brought by federal contractors from multiple states against Executive Order 14042. The district court preliminarily enjoined the federal contractor mandate. The Fifth Circuit, on appeal, held that to allow the mandate would be a "transformative expansion in the President's power under the Procurement Act." The court held Executive Order 14042 was consequently unlawful and, therefore, upheld the district court's grant of a preliminary injunction.
3. *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022): This is an appeal of the lower court's issuance of a nationwide injunction against the contractor

vaccine mandate. The ruling of the district court was affirmed in part and vacated in part. The grant of a preliminary injunction was upheld because the plaintiffs were likely to succeed on the merits. However, this court held that the injunction should not apply nationally and limited the scope of the original injunction.

4. *Peterson v. Honeywell Fed. Mfg. & Techs.*, No. 4:21-CV-00931-DGK, 2022 U.S. Dist. LEXIS 836 (W.D. Mo. Jan. 4, 2022): This case was brought pro se by an employee of a federal contractor seeking, among other things, a temporary restraining order against employer's enforcement of the contractor mandate, which had already been nationally enjoined at the time. The court held that plaintiff had not carried the necessary burden of proof required for a TRO.
5. *Mo. v. Biden*, No. 22-1104, 2023 U.S. App. LEXIS 14065 (8th Cir. June 7, 2023): This is an appeal of the district court's grant of preliminary injunction regarding the federal contractor mandate. However, Executive Order 14042 was revoked by the Biden Administration. As such, this opinion deals with the government's voluntary dismissal motion. Because of the revocation of the Executive Order, the case was dismissed as moot and remanded to the lower court.
6. *Florida v. Nelson*, 576 F. Supp. 3d 1017 (M.D. Fla. 2021): The state of Florida sought an injunction against the enforcement of the contractor mandate. The court granted the injunction holding that the Executive Order exceeded the President's authority under the procurement act.
7. *Commonwealth v. Biden*, 571 F. Supp. 3d 715 (E.D. Ky. Nov. 30, 2021): The state of Kentucky brought a lawsuit against the Biden Administration regarding the federal contractor vaccine mandate. The court enjoined the government from enforcing the vaccine mandate against federal contractors in Tennessee, Ohio, and Kentucky because there had been a demonstration of irreparable harm by plaintiffs. The loss of constitutional freedoms, the court states, "unquestionably constitute[s] irreparable injury."
8. *Brnovich v. Biden*, 562 F. Supp. 3d 123 (D. Ariz. 2022): This was a challenge to the federal contractor mandate brought by the State of Arizona and Attorney General Mark Brnovich seeking a preliminary injunction. The preliminary injunction was granted in part and denied in part. The injunction was granted as to the federal contractor mandate but not the federal employee mandate. The state lacked standing to challenge the employee mandate but showed a strong likelihood of success on the claim that the contractor mandate exceeded the President's authority under the Procurement Act.
9. *Rhoades v. Savannah River Nuclear Sols., L.L.C.*, No.: 1:21-cv-03391-JMC, 2021 WL 6133833 (D.S.C. Dec. 28, 2021): Plaintiff employees sued federal contractor employer after employer issued a vaccine mandate pursuant to EO 14042. The court denied PI, finding *Georgia v. Biden* distinguishable.

10. *See Navy SEAL I v. Biden*, 574 F. Supp. 3d 1124 (M.D. Fla. 2021).

EXHIBIT 2

UNCLAS

PAGE 1 OF 2

TRIDENT ORDER #12 - MANDATORY VACCINATION FOR COVID-19

Originator: COMNAVSPECWARCOM CORONADO CA
TOR: 09/24/2021 19:02:56
DTG: 241857Z Sep 21
Prec: Routine
DAC: General
To: AIG 11370, COMNAVSPECWARGRU EIGHT
CC: COMNAVSPECWARCOM CORONADO CA

RAAUZYUW RUEAAM4294 2671902-UUUU--RUEAAA.
ZNR UUUUU ZDH ZUI RUEOMCI0016 2671902
R 241857Z SEP 21
FM COMNAVSPECWARCOM CORONADO CA
TO AIG 11370
RUEAAA/COMNAVSPECWARGRU EIGHT
INFO RUEAAA/COMNAVSPECWARCOM CORONADO CA
BT
UNCLAS
SUBJ/TRIDENT ORDER #12 - MANDATORY VACCINATION FOR COVID-19
REF (A) SECRETARY OF DEFENSE MEMORANDUM, MANDATORY CORONAVIRUS
DISEASE
2019 VACCINATION OF DEPARTMENT OF DEFENSE SERVICE MEMBERS, DATED 24
AUG 21
REF (B) DEPARTMENT OF DEFENSE INSTRUCTION 6205.02, DEPARTMENT OF
DEFENSE IMMUNIZATION PROGRAM, DATED 23 JUL 19
REF (C) ALNAV 062/21, 2021-2022 DEPARTMENT OF THE NAVY MANDATORY
COVID-19 VACCINATION POLICY
REF (D) NAVADMIN 190/21, 2021-2022 NAVY MANDATORY COVID-19
VACCINATION
AND REPORTING POLICY
REF (F) BUMEDINST 6230.15B, IMMUNIZATIONS AND CHEMOPROPHYLAXIS FOR
THE
PREVENTION OF INFECTIOUS DISEASES
REF (G) DODI 1300.7, RELIGIOUS LIBERTY IN THE MILITARY SERVICES
REF (H) BUPERSINST 1730.11A, STANDARDS AND PROCEDURES GOVERNING THE
ACCOMMODATION OF RELIGIOUS PRACTICES
REF (I) MILPERSMAN 1730-020, IMMUNIZATION EXEMPTIONS FOR RELIGIOUS
BELIEFS
REF (J) NAVMED P-117, MANUAL OF THE MEDICAL DEPARTMENT, CHAPTER 15,
SECTION 105
REF (K) USD (P&R) FORCE HEALTH PROTECTION GUIDANCE (SUPPLEMENT 23) -
DEPARTMENT OF DEFENSE GUIDANCE FOR CORONAVIRUS 2019 VACCINATION
ATTESTATION AND SCREENING TESTING FOR UNVACCINATED PERSONNEL, DATED
07
SEP 21.
REF (L) USSOCOM FRAGO 32 TO USSOCOM OPORD FOR CORONAVIRUS DISEASE
(COVID-19), DATED 10 SEP 21.

1. THE SECRETARY OF DEFENSE DETERMINED THAT MANDATORY VACCINATION AGAINST COVID-19 IS NECESSARY TO PROTECT THE FORCE AND DEFEND THE AMERICAN PEOPLE PER REF (A). THE COVID-19 VACCINE IS MANDATED FOR ALL SERVICE MEMBERS.
2. SERVICE MEMBERS ARE CONSIDERED FULLY VACCINATED TWO WEEKS AFTER COMPLETING THE SECOND DOSE OF A TWO-DOSE COVID-19 VACCINE OR TWO WEEKS AFTER RECEIVING A SINGLE DOSE OF A ONE-DOSE VACCINE. SERVICE MEMBERS

UNCLAS

UNCLAS

PAGE 2 OF 7

WITH PREVIOUS COVID-19 INFECTION ARE NOT CONSIDERED FULLY VACCINATED.

3. SERVICE MEMBERS VOLUNTARILY IMMUNIZED WITH A COVID-19 VACCINE UNDER EMERGENCY USE AUTHORIZATION (EUA) PRIOR TO, OR AFTER, THIS MANDATE WILL BE CONSIDERED FULLY VACCINATED. THEREFORE, SERVICE MEMBERS MAY VOLUNTEER TO RECEIVE AN EUA APPROVED VACCINE TO SATISFY THE VACCINE MANDATE.

4. MANDATORY VACCINATION REQUIREMENTS WILL BE IMPLEMENTED IN ACCORDANCE WITH REF (A) THROUGH REF (J). PERSONNEL SUBJECT TO THIS MANDATE MUST RECEIVE THEIR FIRST VACCINE DOSE OR INITIATE A MEDICAL OR ADMINISTRATIVE (INCLUDING RELIGIOUS) EXEMPTION NLT 17 OCT 21, PER REF (L).

A. COMMANDS WILL ENSURE SERVICE MEMBERS REPORT FOR COVID-19 VACCINATION OR RECEIVE COVID-19 VACCINATION ADMINISTRATIVE COUNSELING/WARNING NLT 7 OCT 21 TO COMPLY WITH THE TIMELINES IN THIS ORDER AND REF (D).

B. SERVICE MEMBERS WHO HAVE PENDING EXEMPTION REQUESTS WILL NOT RECEIVE ADMINISTRATIVE COUNSELING/WARNING DUE TO THEIR PENDING REQUESTS BUT SHALL RECEIVE ADMINISTRATIVE COUNSELING/WARNING IF THEIR REQUEST IS DENIED.

6. EXEMPTIONS

A. EXEMPTIONS FOR MEDICAL AND/OR ADMINISTRATIVE (INCLUDING RELIGIOUS) REASONS WILL BE ADJUDICATED VIA SERVICE POLICIES.

B. SERVICE MEMBERS SHOULD CONTACT THEIR HEALTH CARE PROVIDER FOR QUESTIONS ABOUT MEDICAL EXEMPTIONS.

C. SERVICE MEMBERS SHOULD CONTACT THEIR CHAPLAIN OFFICE FOR ASSISTANCE WITH A RELIGIOUS ACCOMMODATION REQUEST.

D. PER REF (J), SPECIAL OPERATIONS DESIGNATED PERSONNEL (SEAL AND SWCC) REFUSING TO RECEIVE RECOMMENDED VACCINES BASED SOLELY ON PERSONAL OR RELIGIOUS BELIEFS WILL STILL BE MEDICALLY DISQUALIFIED. THIS PROVISION DOES NOT PERTAIN TO MEDICAL CONTRAINDICATIONS OR ALLERGIES TO VACCINE ADMINISTRATION. WAIVER FROM MEDICAL REQUIREMENTS

FOR SPECIAL OPERATIONS QUALIFICATION REQUIRES A SEPARATE WAIVER THAT IS IN ADDITION TO WAIVER OF THE COVID-19 VACCINE REQUIREMENT FOR ALL SERVICE MEMBERS.

E. ECHELON III COMMANDS WILL COPY COMNAVSPESWARCOM FORCE MEDICAL (N04) ON EXEMPTION ENDORSEMENTS ON THEIR REPORTING TO CHIEF OF NAVAL PERSONNEL N1.

7. AUTHORITY TO DISPOSE OF CASES FOR SERVICE MEMBERS WHO REMAIN UNVACCINATED AFTER 28 NOV 21 IS WITHHELD PER REF (D). REPORTING PROCEDURES AND INFORMATION CONCERNING DISPOSITION OF THESE CASES WILL BE PROMULGATED IN THE FUTURE AFTER THE DESIGNATED COVID CONSOLIDATED DISPOSITION AUTHORITY IS APPOINTED FOR THE NAVY.

BT
#4294
C316

NNNN
Received from AUTODIN 241902Z Sep 21

UNCLAS

EXHIBIT 3

Religious Accommodations

Background: On 22 January 2014, SECDEF released a new DoDI (see TAB A) changing the way requests for religious accommodation would be routed and reviewed. Previously, Commanding Officers had the authority to approve or deny requests for religious accommodation. There was no consistency and some Commanding Officers did not significantly evaluate the request. The DoDI transferred the decision authority for all requests for religious accommodation that fall outside current uniform and grooming standards as well as Navy policy to CNP. In order to ensure each request is given due consideration, the DoDI instructs CNP to view each request in its entirety. Each request is evaluated on a case by case basis. For example, a request from an operational member to grow a beard may be denied, while the same request made by a Sailor on shore duty could be approved. Whatever the decision, it is only valid while the Sailor's circumstances remain the same. If the Sailor executes PCS orders or the nature of the Sailor's work changes significantly, a new request will have to be routed. The Sailor must abide by current Navy standards and policy while the request is being adjudicated. Reservists also fall under this instruction. They are required to submit their requests via the same channels as active duty.

Step-by-Step Instructions

Phase 0 (Steps 1 – 5)

1. N131 receives Religious Accommodation (RA) requests via a functional email distro, [ALTN Navy Religious Accommodations@navy.mil](mailto:ALTN_Navy_Religious_Accommodations@navy.mil). The inbox only reliably receives email from NMCI email addresses, so submitters are encouraged to send an email without an encrypted endorsement first to ensure communication is received. Here is an example of an email requesting consideration of an RA:



2. Reply all to the email and acknowledge receipt of the request with the following response:

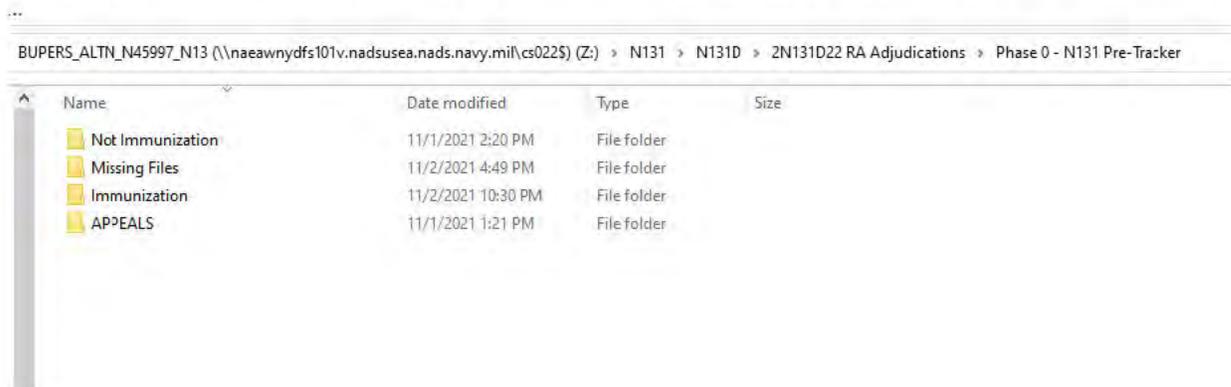
YN2,

I have received your message and will begin routing the RA package for [REDACTED]

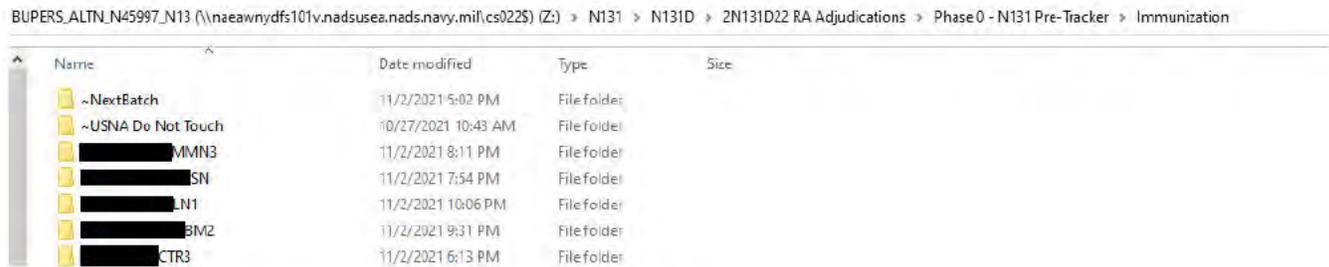
An individual response letter will be returned to the command once the member's accommodation has been adjudicated.

Very Respectfully,

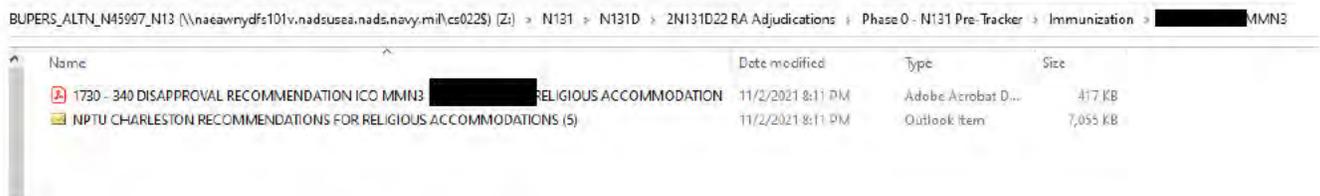
3. Go to the Phase 0 - N131 Pre-Tracker folder on the shared drive and select the appropriate folder.



4. Create a new folder with the following nomenclature: Last, First RANK.



5. Drag and drop a copy of the request and the original email.



Phase 1a (Steps 6 – 13)

6. Open the RA Tracker located on the shared drive at N131 > N131D > 2N131D23 RA Tracker > Data tab. Add the new request to the bottom of the spreadsheet and ensure there are no duplicate entries. Fill in all vacant fields using the Original request as the authoritative data source

The image shows a screenshot of a spreadsheet titled "RA Tracker". The spreadsheet has multiple columns and rows of data. The columns include fields for dates, names, and various status indicators. The data appears to be organized in a structured manner, likely representing a list of requests or cases. The spreadsheet is viewed in a "Data" tab, as indicated by the text in the instruction above.

7. Move the file to the Phase 1 - Initial Intake\Phase 1 - Immunizations\00 Initial Drop Off folder.

BUPERS_ALT_N45997_N13 (\naeawnydfs101v.nadsusea.nads.navy.mi\cs0225) (Z:) > N131 > N131D > 2N131D22 RA Adjudications > Phase 1 - Initial Intake > Phase 1 - Immunizations > 00 Initial Drop Off

The image shows a screenshot of a file explorer window. The window displays a list of folders in a table format. The columns are labeled "Name", "Date modified", "Type", and "Size". The folders listed are MA2, LCDR, AM2, and FTC, all of which are file folders. The "Date modified" column shows dates and times for each folder.

Name	Date modified	Type	Size
MA2	11/2/2021 11:42 PM	File folder	
LCDR	11/1/2021 6:21 PM	File folder	
AM2	11/2/2021 11:46 PM	File folder	
FTC	11/2/2021 11:47 PM	File folder	

8. Open the original request to ensure the following are included IAW BUPERSINST 1730.11A and MILPERSMAN 1730-020: (Appeals only require member’s request and command endorsement)
 - a. Member’s Request
 - b. Command Endorsement (+Second Endorsement if not an O-6 Command)
 - c. Chaplain Memo
 - d. Chaplain Checklist
 - e. Page 13 (Immunizations Only)

9. The Member's request should look like this and addressed to the CO, or CNO or DCNO (N1)

21 JUN 2021

From: [REDACTED] USN
 To: Commanding Officer, CNAATTU Lemoore, USN

Subj: REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

Ref: (a) DoD Instruction 1300.17
 (b) SECNAVINST 1730.8
 (c) BUPERSINST 1730.11

Encl: (1) Photograph (to show the neat and conservative manner of requested policy waiver)
 (2) Chaplain interview checklist
 (3) Religious leader endorsement letter

1. Pursuant to references (a) through (c), I am requesting a religious accommodation from Navy policy to grow my beard in a neat and conservative manner due to my strongly held religious belief and practice of my faith that prohibits shaving for Muslim males in accordance with tradition of the Prophet Muhammad.

2. My request is based on my religious beliefs and views that Muslim men who abide by the Qur'an and the example of the Prophet Muhammad are not permitted to shave their beard though they are able to ensure proper grooming to maintain and present in an acceptable way.

3. I certify that I understand that any approved or partially approved waiver may not be appropriate for future duty to which I may be assigned, including operational, non-operational or training command(s), and may be suspended or withdrawn in accordance with reference (c).

[REDACTED SIGNATURE]

(Signature)

10. A Command Endorsement with a CO recommendation (ISIC required if not an O-6):



DEPARTMENT OF THE NAVY
 CENTER FOR NAVAL AVIATION TECHNICAL TRAINING UNIT
 201 ESTERLINE AVENUE
 LEMOORE, CA 93240-3008

NAVAL FORM 1730
 SET 06/184
 24 JUN 21

FIRST ENDORSEMENT on [REDACTED] USN (r dtd 21 Jun 21)

From: Commanding Officer, Center for Naval Aviation Technical Training Unit, Lemoore
 To: Chief of Naval Operations (N1)
 Via: (1) Commanding Officer, Naval Education and Training Command
 (2) Commanding Officer, Center for Naval Aviation Technical Training

Subj: APPROVAL RECOMMENDATION IC'D [REDACTED] USN,
 RELIGIOUS ACCOMMODATION

Ref: (a) DoD Instruction 1300.17
 (b) SECNAVINST 1730.8
 (c) BUPERSINST 1730.11A

Encl: (1) Sailor's request of 21 Jun 21
 (2) Chaplain Memorandum and Interview Checklist
 (3) Sailor photograph
 (4) Religious Leader endorsement letter

1. Per references (a) through (c), I am forwarding this request recommending approval in part during the following environments:

- a. Operational recommendation: N/A
- b. Non-operational recommendation: N/A
- c. Training environment recommendation: Service member is attached to the [REDACTED] I recommend approval of a beard, not to exceed two inches in length, outside of the Navy's grooming standards while assigned to this command.

2. The following information is provided for consideration as applicable (articulate the factual basis underlying any compelling government interest and why the denial or partial denial is the least restrictive means available to protect the compelling government interest over the individual request):

- a. The importance of military policy, practice or duty from which religious accommodation is sought in terms of mission accomplishment, including:
 - (1) Military readiness: None
 - (2) Unit cohesion: None

11. Chaplain Memorandum for the Record and interview checklist from the Chaplain who interviewed the Sailor about the request for religious accommodation.

CHAPLAIN MEMORANDUM FOR THE RECORD

From: [REDACTED] ISM
 To: COMMANDING OFFICER, [REDACTED]

Subj: REQUEST FOR A WAIVER OF POLICY TO ACCOMMODATE PRACTICE BASED ON RELIGIOUS BELIEF IGO [REDACTED]

Ref: (a) SECNAVINST 1730.8B
 (b) SECNAVINST 1730.9A
 (c) BUPERSINST 1730.11A
 (d) RELIGIOUS AFFILIATION LETTER

1. [REDACTED] has submitted a request for accommodation of religious practice per paragraph (c). Per BUPERSINST 1730.11A, I interviewed the requester on 11 Jan 2021. I explained that this interview would not be a confidential communication as defined by reference (b) and informed the requester that refusal for confidential chaplain support was available.

2. [REDACTED] met with me to solicit assistance in requesting a waiver of grooming standards due to his religious beliefs, that shaving one's beard is not a permissible practice within the Islamic faith as a beard is considered a symbol of a devout Muslim man following in the way of the Prophet Muhammad.

3. [REDACTED] lists his religious preference as Muslim in accordance with NAVPERS 1070/602.

4. An alternate means of meeting this religious requirement is unavailable.

5. After an extensive interview and review of [REDACTED]'s supporting materials, I am persuaded as to the sincerity of his belief. I have spoken with [REDACTED] at several occasions concerning his deeply held religious beliefs and am thoroughly convinced of his devotion to those beliefs. [REDACTED] has provided reference (d), which is a letter from the Inaan Mahdi Association of Malaysia in support of this request for religious

16 Mar 2021

CHAPLAIN INTERVIEW CHECKLIST TEMPLATE

Requester:			Interview Date: 11 Jan 2021		
Name: [REDACTED]			Chaplain Interviewer: [REDACTED]		
Phone: [REDACTED]			Phone: [REDACTED]		
Email: [REDACTED]			E-mail: [REDACTED]		
Command: [REDACTED]			Chaplain's Command: [REDACTED]		
Interview Preliminaries					
Yes	No	NA			
<input checked="" type="checkbox"/>			Chaplain reviewed policy and doctrine on religious accommodation and the policy for which the requestor is seeking accommodation.		
<input checked="" type="checkbox"/>			Applicant was notified that the interview is not confidential and will be used to advise the command.		
<input checked="" type="checkbox"/>			Chaplain explained to the applicant that confidential support can be received from another chaplain.		
<input checked="" type="checkbox"/>			Applicant has been granted a waiver for this practice previously.		
<input checked="" type="checkbox"/>			Applicant's Page 2 (NAVPERS 1070/602) reflects the belief cited in the application.		
Type of Waiver Requested					
Yes	No	NA			
<input checked="" type="checkbox"/>			Uniform standards		
<input checked="" type="checkbox"/>			Grooming standards		
<input checked="" type="checkbox"/>			Immunization requirements		
<input checked="" type="checkbox"/>			DNA sampling		
<input checked="" type="checkbox"/>			Other (Please describe):		
Interview					
Yes	No	NA			
<input checked="" type="checkbox"/>			Requestor's religious beliefs seemed honestly and sincerely held using one or more of the following factors:		
<input checked="" type="checkbox"/>			1. Requestor was credible (consistently keeps tenets, practices, etc.).		
<input checked="" type="checkbox"/>			2. Requestor's demeanor and pattern of conduct are consistent with the request.		
<input checked="" type="checkbox"/>			3. Requestor participates in activities associated with the belief(s).		
<input checked="" type="checkbox"/>			4. Other persons supporting the claim are credible.		
<input checked="" type="checkbox"/>			5. Request is supported by letter(s) of verification or endorsement from an organization espousing the beliefs which are the basis for the claim.		
<input checked="" type="checkbox"/>			Alternate means of accommodating the practice were explored in the interview.		
Process Checklist					
Yes	No	NA			
<input checked="" type="checkbox"/>			Chaplain has prepared a memorandum documenting the interview.		
<input checked="" type="checkbox"/>			Chaplain reviewed memorandum with applicant and provided a copy.		
<input checked="" type="checkbox"/>			Chaplain submitted the memorandum and this document to the commanding officer via chain of command.		
<input checked="" type="checkbox"/>			Chaplain referred applicant to command to process request.		

12. Page 13 (Immunizations Only)

ADMINISTRATIVE REMARKS NAVPERS 1670/613 (REV. 08-2012) PREVIOUS EDITIONS ARE OBSOLETE SUPPORTING DIRECTIVE MILPERSMAN 1978-320		
SHIP OR STATION [REDACTED]		
SUBJECT: COVID-19 Administration Counseling/Waiver		<input checked="" type="checkbox"/> PERMANENT <input type="checkbox"/> TEMPORARY AUTHORITY IF PERMANENT: SUPERINSTE 173811A and ALNAV 04221
I request a waiver of the COVID-19 immunization. I hereby state that my request is based upon religious objections to the COVID-19 immunization. I acknowledge having received the following counseling: 1. Failure to obtain immunization poses additional risk to my health upon exposure to disease. 2. In the event of foreign travel, I may be detained during travel across foreign borders due to international health regulations. 3. If granted, a waiver may be revoked by my commanding officer (i) am at imminent risk of disease or due to international health regulations. 4. If my job duties change, I may need to route a new request. 5. If I am at my permanent change of station while my waiver is in effect, I may need to route a new request if my job duties change, my geographic region exposes me to the aforementioned disease, or other factors exist that could put me at imminent risk of disease.		
[REDACTED] Service Member's Signature Date/Signat		
[REDACTED] Witness' Signature Date/Signat		
ENTERED AND VERIFIED IN ELECTRONIC SERVICE RECORD:		
VERIFYING OFFICIAL RANK OR GRADE/TITLE [REDACTED]	DATE [REDACTED]	SIGNATURE OF VERIFYING OFFICIAL: [REDACTED]
NAME (LAST, FIRST, MIDDLE): [REDACTED]	SOCIAL SECURITY NUMBER: [REDACTED]	BRANCH AND CLASS: USN / ACTIVE
FOR OFFICIAL USE ONLY PRIVACY SENSITIVE		

13. If all the documents are included and completed properly route to RA Adjudications\Phase 1 - Initial Intake\Phase 1 - Immunizations\01 Ready For Processing

- a. If any of those items are missing, send to 02 Packages Awaiting Documents so the command can be contacted to inquire their whereabouts or the reasons for the error.
 - i. Contact Command via email and follow up with a phone call within 48 hours
 - ii. Ensure the folder is labeled with the missing documents
- b. If there are multiple files send to 03 Folders That Need to Be Consolidated so the items can be consolidated and routed to are missing, send to 02 Packages Awaiting Documents so the command can be contacted to 01 Ready For Processing.
- c. If the request is for a Sailor assigned to a joint command, move it to 04 Sailors Jointly Assigned - Do Not Process
- d. If the member sends an email withdrawing their request, add the email to their folder and move to 05 Member Withdrawn - DO NOT PROCESS\
- e. For any other issues, move to 06 Other Issues - LT Neuer Review

Phase 1 (Steps 14 – 15)

14. Inside the Phase 1 - Immunizations\01 Ready For Processing folder, add the most recent RA Response Letter template and rename the files to the following nomenclature:
 - a. 1 - RA Response Letter ICO *Last First RANK*
 - b. 2 - RA Request ICO *Last First RANK*
 - c. 5 - Original Email ICO *Last First RANK*

NI31D > 2N131D22 RA Adjudications > Phase 1 - Initial Intake > Phase 1 - Immunizations > 01 Ready For Processing > FCC Hickman (A-F) > Achanzar, Joshua HN

Name	Date modified	Type	Size
1 - RA Response Letter ICO [REDACTED] HN	10/27/2021 9:35 AM	Microsoft Word D...	43 KB
2 - RA Request ICO [REDACTED] HN	10/28/2021 7:10 PM	Adobe Acrobat D...	512 KB
5 - Original Email ICO [REDACTED] HN	11/1/2021 11:34 AM	Outlook Item	618 KB

15. Open 1 - RA Response Letter ICO Last, First RANK to update the response letter to reflect the new request's specific information from the 2 – RA Request ICO Last, First RANK document. The highlighted sections below are the sections that will need to be updated. Save those changes and route to Phase 3 after verification of all five initial documents are confirmed from Step 8.



DEPARTMENT OF THE NAVY
 OFFICE OF THE CHIEF OF NAVAL OPERATIONS
 3300 PENTAGON
 WASHINGTON, DC 20350-3000

1730
 Ser NI/

From: Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) (N1)
 To: **RATE RANK (DESIG) First MI Last, USN**
 Via: Commanding Officer, **PCU HYMAN G. RICKOVER (SSN 795)**

Subj: REQUEST FOR RELIGIOUS ACCOMMODATION THROUGH WAIVER OF IMMUNIZATION REQUIREMENTS

Ref: (a) 42 U.S.C. §2000bb-1
 (b) DoD Instruction 1300.17 of 1 September 2020
 (c) SECNAVINST 1730.8B
 (d) ASN (M&RA) memo of 6 June 13
 (e) MILPERSMAN 1730-020
 (f) United States Attorney General memo of 6 October 17
 (g) Your **lt of 10 Dec 20** wends
 (h) BUMED lt 6320 Ser M44/21UMXXXXX of **dd Memo cv**

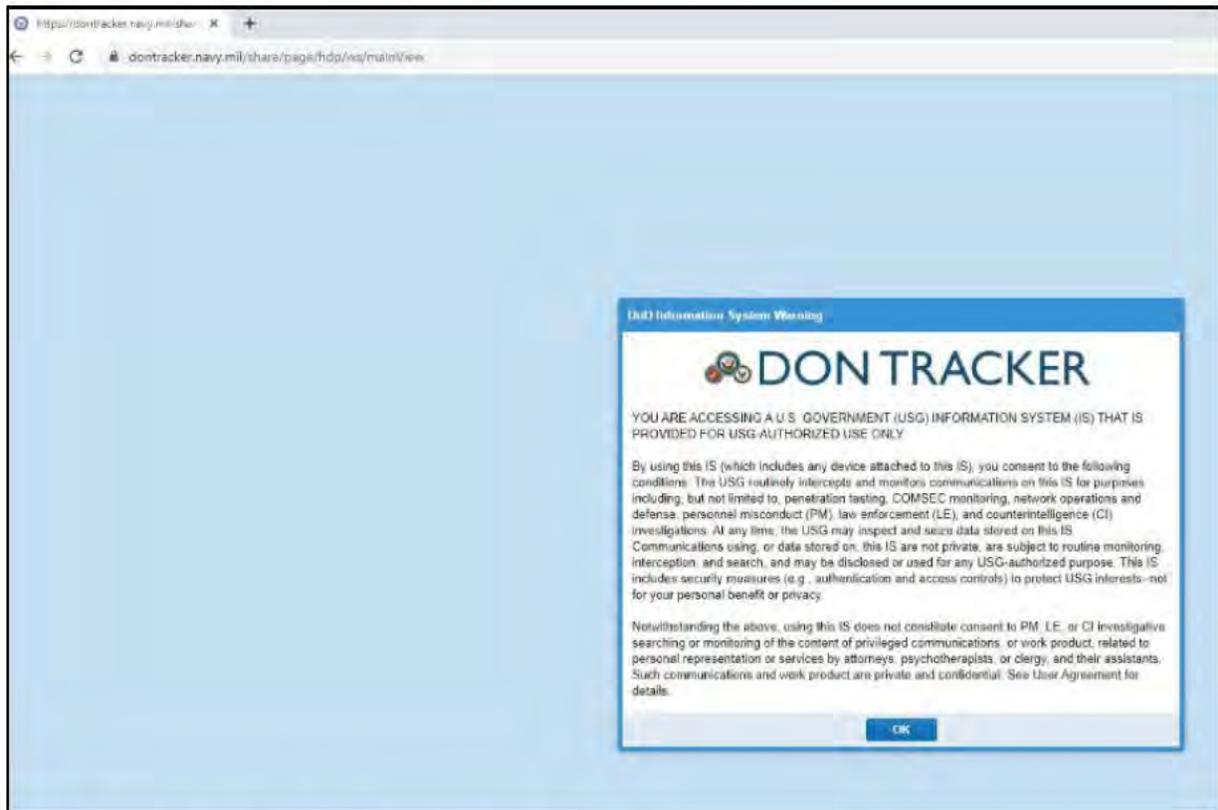
1. Pursuant to references (a) through (h), your request for religious accommodation through waiver of immunization requirements is disapproved. You must receive all required vaccines. However, you are free to request from your healthcare provider alternative vaccines that are available and meet the Navy's immunization requirements, as determined by a credentialed military healthcare provider. You are free to choose which COVID-19 vaccine to take. If you choose a COVID-19 vaccine that requires two doses, you must receive your first dose within five calendar (5) days upon receipt of this letter and complete the series as prescribed. If you choose a one-dose vaccine you must meet the established vaccination timeline or receive the vaccine within five calendar (5) days upon receipt of this letter, whichever is later.

2. In line with references (b) through (d), I am designated as the approval authority for requests for religious accommodation.

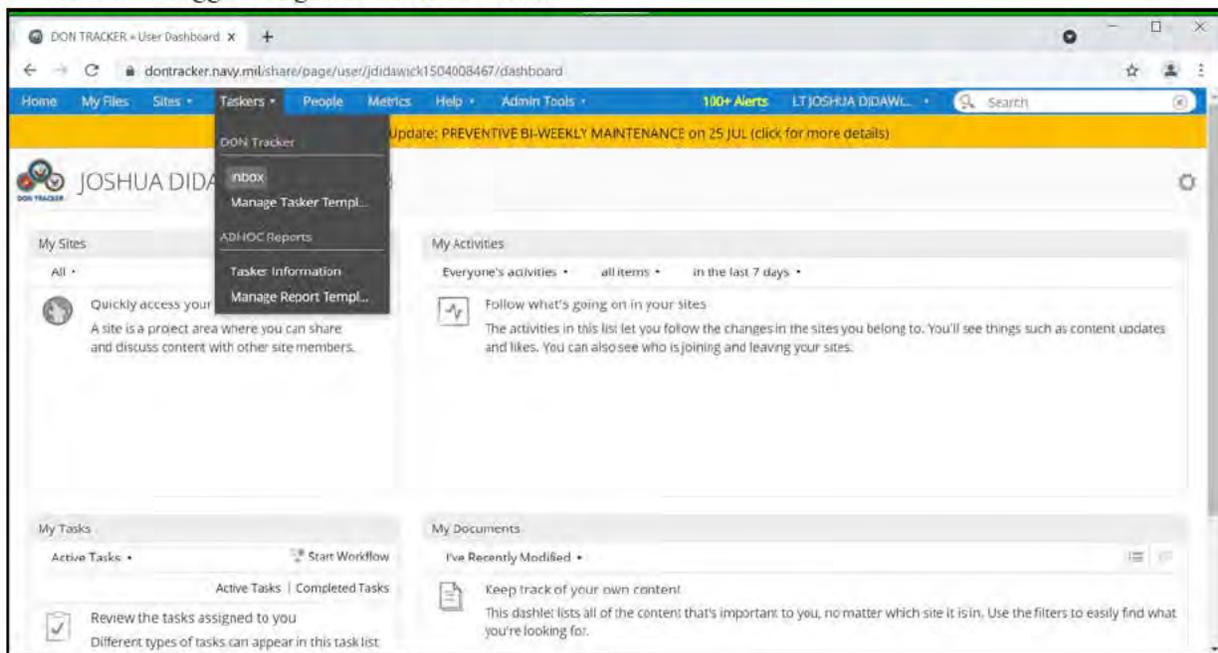
3. Reference (a), the Religious Freedom Restoration Act (RFRA), states that the Government may substantially burden an individual's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Reference (b) incorporates the RFRA and notes that the Government has a compelling interest in mission accomplishment, to include military readiness, unit cohesion, good order and discipline, health and safety, on both individual and unit levels. Additionally, unless it will have an adverse impact on mission accomplishment, including military readiness, unit cohesion and good order and discipline, the Navy will accommodate individual expressions of sincerely held beliefs of Sailors. Reference (d)

Phase 3 (Steps 16 – 28)

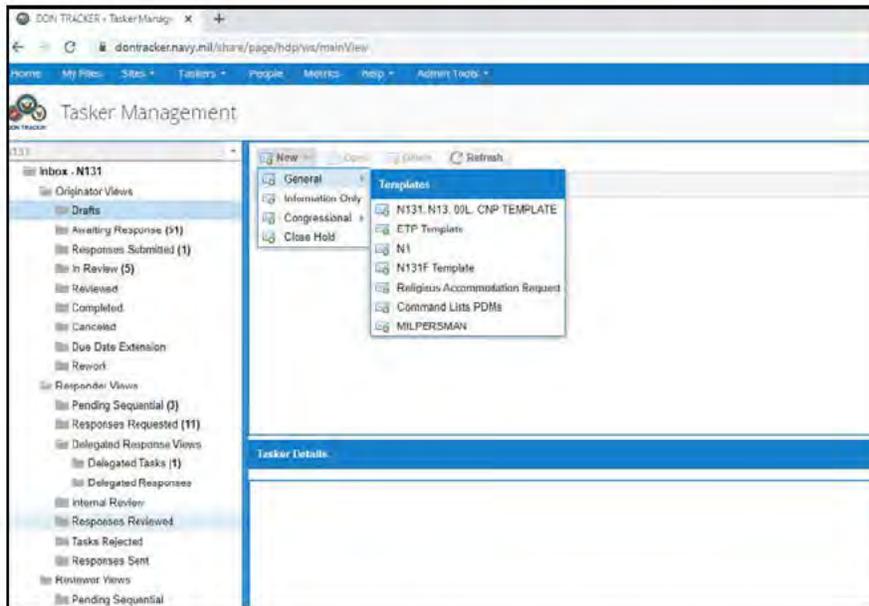
16. Uploaded into DonTracker. Visit dontracker.navy.mil to log in.



17. Once logged in, go to Taskers > Inbox

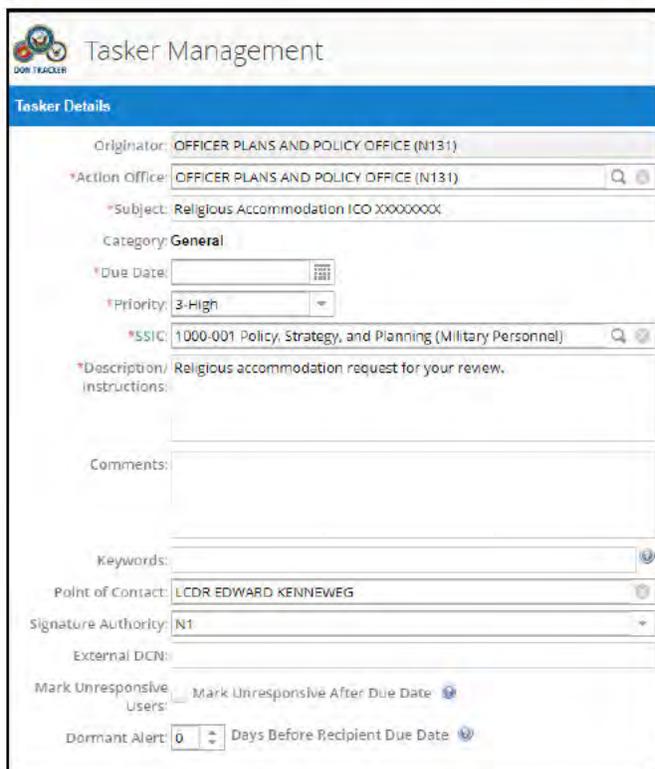


18. Once at the Inbox, select New > Templates > Religious Accommodation Request.



19. Under Tasker Details fill in the following information:

- a. Subject—Religious Accommodation ICO *Rank/Rate Last Name*;
- b. Due Date—Due date is 7 days, but select the next business day;
- c. Priority—Select Medium;
- d. Point of Contact—Insert the name of the person who is responsible for the process.



20. Under Responders, is where you designate who reviews the tasker and their respective deadlines.

- e. Due Dates will automatically be populated based on the 7-day deadline;
 - i. BUMED (SECRETARIAT - TASKER GROUP) (BUMED (FRONT OFFICE))
 - ii. POLICY AND STRATEGY (N0975 TASKER GROUP)
 - iii. SPECIAL ASSISTANT FOR LEGAL MATTERS (CNP LEGAL FRONT OFFICE)
 - iv. N1 FLEET MASTER CHIEF (N1 FLEET)

Responders				
+ Add + Edit Multiple + Remove + Revert Workflow Type: Parallel				
	Type	*Responder	Description/Instructions	*Due Date
<input type="checkbox"/>	1	Responder	*BUMED (SECRETARIAT - TASKER GROUP) (BUMED (FRONT OFFICE))	*
<input type="checkbox"/>	2	Responder	*POLICY AND STRATEGY (N0975 TASKER GROUP)	*
<input type="checkbox"/>	3	Responder	*OFFICER PLANS AND POLICY OFFICE (N131)	*
<input type="checkbox"/>	4	Responder	*SPECIAL ASSISTANT FOR LEGAL MATTERS (CNP LEGAL FRONT OFFICE)	*
<input type="checkbox"/>	5	Responder	*N1 FLEET MASTER CHIEF (N1 FLEET)	*
<input type="checkbox"/>	6	Responder	*TOTAL FORCE MANPOWER AND PERSONNEL PLANS AND POLICY (N13 FRONT OFFICE)	*
<input type="checkbox"/>	7	Responder	*MANPOWER, PERSONNEL, TRAINING, AND EDUCATION (N1 FRONT OFFICE)	*

21. In the Attachments section, select Add Attachment > Add Local Files > then select and categorize the following files:

- f. 1 - RA Response Letter ICO *Last First RANK* (Organizational Response)
- g. 2 - RA Request ICO *Last First RANK* (Original Source Document)

Attachments			
+ Add Attachment			
File Name and Version	Description	*Category	Document Date

22. Below is completed tasker. If no other changes are necessary, click Send to begin the workflow.

The screenshot displays the 'Tasker Management' interface in a web browser. The main content area is divided into three sections:

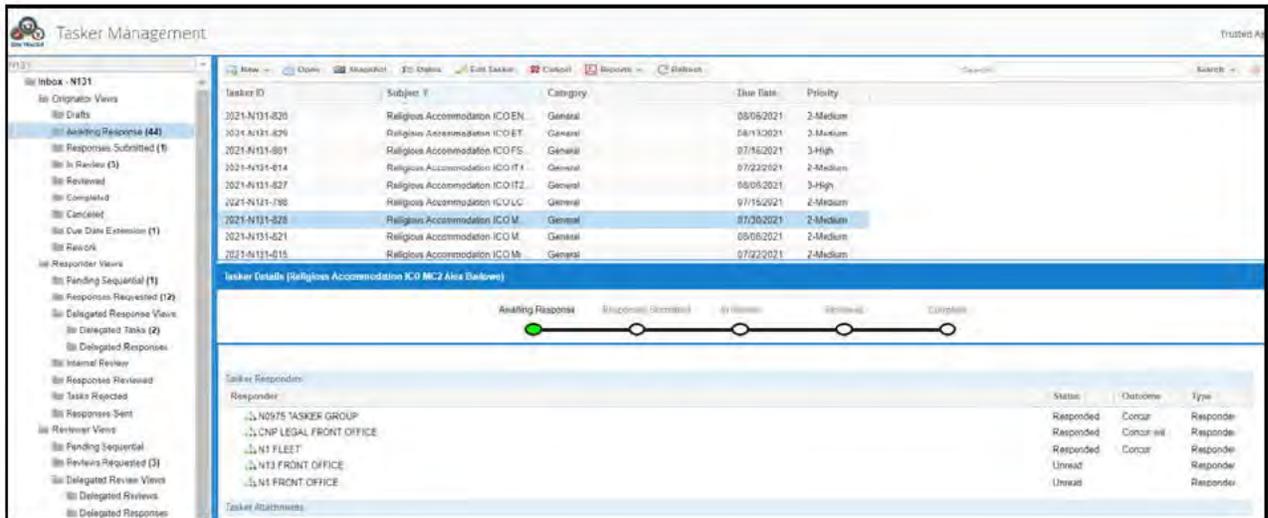
- Tasker Details:** Shows the originator as 'OFFICER PLANS AND POLICY OFFICE (N131)', subject as 'Religious Accommodation ICO ATAN Adam Alazzawi', and due date as '06/09/2021'. The description is 'religious accommodation request for your review'.
- Responders:** A table listing five responders:

Type	Responder	Description/Instructions	Due Date
1	Responder	*POLICY AND STRATEGY (N975 TASKER GROUP)	07/14/2021
2	Responder	*SPECIAL ASSISTANT FOR LEGAL MATTERS (ONP LEGAL FRONT OFFICE)	07/14/2021
3	Responder	*N1 FLEET MASTER, CHIEF (N1 FLEET)	07/14/2021
4	Responder	*TOTAL FORCE MANPOWER AND PERSONNEL PLANS AND POLICY (N13 FRONT OFFICE)	07/23/2021
5	Responder	*MANPOWER, PERSONNEL, TRAINING, AND EDUCATION (N1 FRONT OFFICE)	08/09/2021
- Attachments:** A list of files including 'N13 to N1 Backslip - RA ICO', 'REF B - RA Tracker.pdf', 'REF C - DCNO N1 1730 In Ser 114109 of 3 Jun 24.pdf', 'REF D - PHOTO.jpg', 'TAB A - Response Letter', 'TAB B - Religious Accommodation Request ICO', and 'TAB C - Coordination Page'.

23. Once the workflow has started, you will receive the following message.

The notification is a blue-bordered box with a white background. It features a blue header with the text 'Tasker Sent'. Below the header is an information icon (a lowercase 'i' in a circle) followed by the text 'Tasker: [2021-N131-824](#) has been sent successfully.' At the bottom center of the box is a blue button with the text 'OK' in white. Below the notification box, a faint 'Delete Workflow Template' button is visible.

24. You must periodically check the status of the by going to your Inbox > Awaiting Responses. The taskers can be sorted by tasker number, subject, due date, etc. By clicking on a tasker, you can see where the tasker is in the process in the Tasker Details window,



25. Retrieve legal memos from the following folder: RA Adjudications\New Legal Memo Dropoff and add to the folder.

26. Once a response by BUMED populates, download the BUMED Memo to the member's folder. Ensure the name and date of member's request are accurate (if not correct send back for rework).

27. Update Date/Serial in Ref H on the Response Letter (1 - Response Letter ICO Last, First RANK)



DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
1340 NAVAL PENTAGON
WASHINGTON, DC 20350-5000

1730
Ser N1/

From: Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) (N1)
To: **RATE RANK (DESIG) First MI Last, USN**
Via: Commanding Officer, **PCU HYMAN G. RICKOVER (SSN 795)**

Subj: REQUEST FOR RELIGIOUS ACCOMMODATION THROUGH WAIVER OF IMMUNIZATION REQUIREMENTS

Ref: (a) 42 U.S.C. §2000bb-1
(b) DoD Instruction 1300.17 of 1 September 2020
(c) SECNAVINST 1730.8B
(d) ASN (M&RA) memo of 6 June 13
(e) MILPERSMAN 1730-020
(f) United States Attorney General memo of 6 October 17
(g) Your **ltr of 20 Dec 20** w/ends
(h) BUMED **ltr 6320 Ser.M44/21UMXXXXXX of dd Mmm yy**

1. Pursuant to references (a) through (h), your request for religious accommodation through waiver of immunization requirements is disapproved. You must receive all required vaccines. However, you are free to request from your healthcare provider alternative vaccines that are available and meet the Navy's immunization requirements, as determined by a credentialed military healthcare provider. You are free to choose which COVID-19 vaccine to take. If you choose a COVID-19 vaccine that requires two doses, you must receive your first does within five calendar (5) days upon receipt of this letter and complete the series as prescribed. If you choose a one-dose vaccine you must meet the established vaccination timeline or receive the vaccine within five calendar (5) days upon receipt of this letter, whichever is later.

2. In line with references (b) through (d), I am designated as the approval authority for requests for religious accommodation.

3. Reference (a), the Religious Freedom Restoration Act (RFRA), states that the Government may substantially burden an individual's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Reference (b) incorporates the RFRA and notes that the Government has a compelling interest in mission accomplishment, to include military readiness, unit cohesion, good order and discipline, health and safety, on both individual and unit levels. Additionally, unless it will have an adverse impact on mission accomplishment,

28. Once a tasker has been responded to by N0975, CNP LEGAL FRONT OFFICE, N1 FLEET, and BUMED, send to the Phase 4 folder - 0 Ready For Processing / 00 Phase 3 Drop Off

C:\BUPERS_ALT\N45997_N13 (\neeawnydfs101v.nadsusea.nads.navy.mil\cs0225) (Z) > N131 > N131D > 2N131D22 RA Adjudications > Phase 4 - Ready for N131 Review

Name	Date modified	Type	Size
0 Ready For Processing	11/2/2021 8:17 PM	File folder	
1 Awaiting LT [REDACTED]	11/2/2021 8:11 PM	File folder	

29. Do not forward unless all stakeholders have reviewed and following documents are in the folder:

- a. 1 - RA Response Letter ICO Last First RANK
- b. 2 - RA Request ICO Last First RANK
- c. 3 - RA Legal Memo ICO Last First RANK
- d. 4 - BUMED Memo ICO Last First RANK
- e. 5 - Original Email ICO Last First RANK

Phase 4 (Steps 29 – 44)

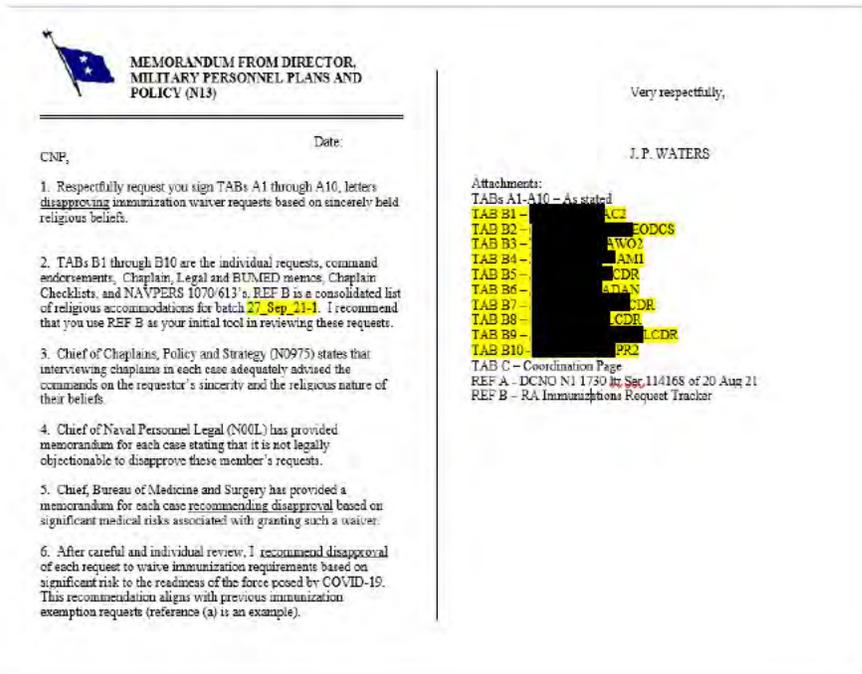
- 30. Create a new folder with the following nomenclature:
 - a. DD_MON_YY – In Progress



- 31. Add 10 folders from 00 Phase 3 Drop Off folder
 - a. Priority (CMD Triad/Other Priority)
 - b. Officers/E-9
 - c. Oldest to Newest Active Duty/MOB/RECALL
 - d. SELRES

- 32. Add the following documents to the DD_MON_YY – In Progress folder
 - a. N13 to N1 Buckslip - Template
 - b. REF B - RA Immunizations Requests Tracker Template
 - c. TAB C Coordination Page RA Template
 - d. REF A - DCNO N1 1730 Itr Ser 114168 of 20 Aug 21

- 33. Open N13 to N1 Buckslip. Update the date and list of 10 attachments based on the selected files.



39. Open “TAB C - Coordination Page – *Rank/Rate Last Name*” to update the dates on the coordination page to the current date of processing to match the folder. Save the changes.

COORDINATION PAGE

Sailor Request - Accommodation from MILPERSMAN 1730-020 to waive immunization requirements.

DCNO N1 Response - Disapproval (Member and Fleet Safety)

<u>Office Dept</u>	<u>Point of Contact/Title</u>	<u>Phone</u>	<u>Date</u>	<u>Remarks</u>
OPNAV (N0975)	LCDR S. Deese	(703) 695-3824	25 Sep 21	Top interviewing chaplain adequately advised the command on the requestor's sincerity and the religious nature of their beliefs
OPNAV N1 FLT equity for Officers	FLTCM W. Koshoffer	(703) 604-2616	25 Sep 21	Concur/ No
OPNAV N1 JAG	CDR A. Leahy	(703) 604-5804	25 Sep 21	Concur
OPNAV (N131)	CDR D. Cua	(703) 604-5023	25 Sep 21	Concur
OPNAV (N13)	RADM J. P. Waters	(703) 604-5040		
OPNAV (N1)	VADM John B. Nowell, Jr	(703) 604-2748		

40. Upon Completion of the file modification, move entire file to 4 - Ready for N131 Review\2 Awaiting N131 Review (LT Didawick) or 3 Awaiting N131 Review (CDR Cua) based on your assigned reviewer identified on the organization chart.
41. Rename Folder and files with appropriate batch number
 - a. DD_MON_YY-1 (1st Batch)
 - b. DD_MON_YY-2 (2nd Batch)
42. After Review from Phase 4 is complete, drop files in the following folder:
 \\naeawnydfs101v.nadsusea.nads.navy.mil\CS021\$\BUPERS_ALT_N45997_N1\COVID-19 RA
43. Link the spreadsheet in the folder to the locations by pressing CTRL+K on the word “here”
44. Email the N13 Front office that the folder is ready.

Send

To... [Katson, Mery Angela Sanabria CAPT USN DCNO N1 \(USA\)](#)

Cc... [Ausen, Kelsey R PO1 USN DCNO N1 \(USA\)](#); [Molina, Gary LCDR USN DCNO N1 \(USA\)](#); [Didawick, Joshua A LT USN DCNO N1 \(USA\)](#) <joshua.didawick@navy.mil>

Subject: Ready for Review 2_Nov_21-2

Deputy,

Please see RA 2_Nov_21-2 at your earliest convenience [here](#).

V/r

Phase 5 (Steps 45 – 47)

45. The request will be routed through the deputy to N13. Once a decision is made by N13, the N13 Administrative Assistant will update the Coordination Page and Buckslip then send the request to N1 via email.
46. Once a final decision has been made on the request, N1 will return the signed TAB A – Response Letter – RA ICO *Rank/Rate Last Name*.
47. N13 Front Office will save the letter in the Sailor’s RA Request folder as “DCNO Signed – *Rank/Rate Last Name RA*” and a notification email will be sent to N131.

Phase 6 (Steps 48 – 50)

48. An email containing that letter is emailed to the Sailor via their command by replying to the original email request.



49. Update the RA Tracker workbook’s Data tab to reflect the dates of the process and approval/disapproval.
50. Move the folder to RA Adjudications > 00 ARCHIVED REQUESTS.



EXHIBIT 4

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-26, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., et al.,

Defendants.

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Civil Action No. 4:21-cv-01236-O

ORDER ON PRELIMINARY INJUNCTION

Our nation asks the men and women in our military to serve, suffer, and sacrifice. But we do not ask them to lay aside their citizenry and give up the very rights they have sworn to protect.¹ Every president since the signing of the Religious Freedom Restoration Act has praised the men and women of the military for their bravery and service in protecting the freedoms this country guarantees.²

In this case, members of the military seek protection under those very freedoms. Thirty-five Navy Special Warfare servicemembers allege that the military’s mandatory vaccination policy violates their religious freedoms under the First Amendment and Religious Freedom Restoration Act. The Navy provides a religious accommodation process, but by all accounts, it is theater. The Navy has not granted a religious exemption to any vaccine in recent memory. It merely rubber stamps each denial. The Navy servicemembers in this case seek to vindicate the very freedoms

¹ George Washington wrote in 1775 that “When we assumed the Soldier, we did not lay aside the Citizen.” Those words are carved into the marble of the Memorial Amphitheater in the Arlington National Cemetery.

² See President William Clinton, Remarks at the Veterans Day National Ceremony (Nov. 11, 1999); President George W. Bush, Remarks at the Veterans Day Proclamation (Oct. 30, 2001); President Barack Obama, Remarks at the Veterans Day National Ceremony (Nov. 11, 2009); President Donald Trump, Remarks at the New York City Veterans Day Parade Address (Nov. 11, 2019); President Joseph Biden, Remarks at the National Veterans Day Observance (Nov. 11, 2021).

they have sacrificed so much to protect.³ The COVID-19 pandemic provides the government no license to abrogate those freedoms. There is no COVID-19 exception to the First Amendment. There is no military exclusion from our Constitution.

Having considered the briefing, oral argument, relevant facts, and applicable law, the Court concludes that Plaintiffs' Motion for Preliminary Injunction should be and is hereby **GRANTED**.

I. BACKGROUND

This case arises from the United States Navy's mandatory COVID-19 vaccination policy. Plaintiffs are thirty-five Navy Special Warfare servicemembers, including SEALs, Special Warfare Combatant Craft Crewmen, Navy Divers, and an Explosive Ordnance Disposal Technician. Compl. 1, 8–9, ECF No. 1. Together, they sue President Biden, Secretary of Defense Austin, Secretary of the Navy Del Toro, and the United States Department of Defense.

A. Factual Background

1. The Navy's Vaccination Policy

In August 2021, the Department of Defense ("DoD") issued a vaccine mandate directing all DoD servicemembers to be vaccinated against COVID-19. Pls.' App. 146–47, ECF No. 17. The Department of the Navy also implemented its own mandate requiring all active-duty Navy servicemembers to be fully vaccinated before November 28 or face the "full range" of disciplinary action. Pls.' App. 149–50, ECF No. 17. For servicemembers assigned to Special Operations duty, the Navy's vaccination policy reads:

[Special Operations] personnel refusing to receive recommended vaccines . . . based solely on personal or religious beliefs are disqualified. This provision does not pertain to medical contraindications or allergies to vaccine administration.

³ Before the Court are the Plaintiffs' Motion for Preliminary Injunction (ECF No. 15), filed November 24, 2021; Defendants' Response (ECF No. 43), filed December 10; and Plaintiffs' Reply (ECF No. 58), filed December 17. The Court held a hearing on the matter on December 20. ECF No. 61.

Manual of the Medical Department (“MANMED”) § 15-105(3)(n)(9); Pls.’ App. 838, ECF No. 17. In addition to those with medical exemptions, “[m]embers who are actively participating in COVID-19 clinical trials are exempted from mandatory vaccination” until the trial concludes. Pls.’ App. 149–50, ECF No. 17.

For those with pending religious exemption requests, being “disqualified” means becoming permanently nondeployable.⁴ Unlike those with medical exemptions and allergies to the vaccine, an unvaccinated servicemember seeking a religious exemption (the “religious servicemember”) continues to be nondeployable, even if he receives the accommodation he requests. Pls.’ App. 159, 838 (Trident Order 12 – Mandatory Vaccination for COVID-19), ECF No. 17. To regain his “deployable” status, the religious servicemember must first receive his religious accommodation, *and then* seek a medical waiver under the Navy’s MANMED. Defs.’ App. 278, ECF No. 44-3.

Each of these steps, by themselves, is monumental. Religious exemptions to the vaccine requirement are virtually non-existent. In the past seven years, the Navy has not granted a religious exemption to any vaccine requirement. Pls.’ App. 295, ECF No. 17.

2. Plaintiffs’ Religious Accommodations Requests

By early November, 99.4% of active-duty Navy servicemembers had been fully vaccinated against COVID-19. Pls.’ App. 284, ECF No. 17. Plaintiffs are part of the remaining 0.6%. Representing the Catholic, Eastern Orthodox, and Protestant branches of Christianity, Plaintiffs object to receiving the COVID-19 vaccine based on their religious beliefs. *Id.* These beliefs fall into the following categories: (1) opposition to abortion and the use of aborted fetal cell lines in

⁴ See Decl. of SEALs 1–19, 21–26, Pls.’ App. 870–980; Decl. of SWCC 1–5, App. 981–1003; Decl. of EOD 1, App. 1016–22; Decl. of ND 1–3, App. 1004–15.

development of the vaccine;⁵ (2) belief that modifying one's body is an affront to the Creator;⁶ (3) direct, divine instruction not to receive the vaccine;⁷ and (4) opposition to injecting trace amounts of animal cells into one's body.⁸ Plaintiffs' beliefs about the vaccine are undisputedly sincere, and it is not the role of this Court to determine their truthfulness or accuracy. *See Davis v. Fort Bend Cnty.*, 765 F.3d 480, 478 (5th Cir. 2014) (citing *United States v. Ballard*, 322 U.S. 78, 86 (1944)).

Plaintiffs filed their religious accommodation requests as early as August and as late as December. *See* Supp. Decl. of SEALs, SWCC, EOD, ND, Supp. App. 1023–1134. In many cases, the Plaintiffs' commanding officers recommended their requests be approved. *See* Supp. Decl. of SEAL 18, Supp. App. 1075; Hr'g Test. of SEAL 3. Even so, as of December 17, the Navy has summarily denied at least twenty-nine of the thirty-five accommodations requests, the majority of which have been appealed. Supp. Decl. of SEALs, SWCC, EOD, ND, Supp. App. 1023–1134. The Navy has made no final determinations on appeal.

To adjudicate a religious accommodation request, the Navy uses a six-phase, fifty-step process. *See* Supp. Decl. of Andrew Stephens, Ex. 1, ECF No. 62. Although "all requests for accommodation of religious practices are assessed on a case-by-case basis," Phase 1 of the Navy guidance document instructs an administrator to update a *prepared* disapproval template with the requester's name and rank. *Id.* Based on this boilerplate rejection, Plaintiffs believe that this process is "pre-determined" and sidesteps the individualized review required by law. *Id.*

⁵ *See* Decl. of SEALs 1–3, 5, 6, 8–15, 17–19, 21–24, 26, App. 871–84, 890–97, 903–37, 944–72, 978–80; Decl. of SWCC 1–4, App. 981–1003; Decl. of EOD 1, App. 1016–22; Decl. of ND 2, App. 1009–11.

⁶ *See* Decl. of SEAL 5, 9–11, 13–15, 18, 22, 25, 26, App. 890–93, 909–20, 926–37, 948–51, 961–64, 974–80; Decl. of SWCC 1, 5, App. 982–85, 1000–03; Decl. of EOD 1, App. 1016–22; Decl. of ND 1, 3, App. 1004–07, 1013–15.

⁷ *See* Decl. of SEAL 7 and 19, App. 899–900, 954.

⁸ *See* Decl. of SEAL 13, App. 927; Decl. of EOD 1, App. 1018.

B. Procedural History

On November 9, 2021, Plaintiffs filed this lawsuit challenging the Navy’s vaccination mandate. *See* Compl. 38, ECF No. 1. In response to the Court’s order for a status report, Plaintiffs filed their Motion for Preliminary Injunction (ECF No. 15), on November 24, 2021. Defendants responded on December 10. *See* Defs.’ Resp., ECF No. 43. Plaintiffs filed their reply December 17. *See* Pls.’ Reply, ECF No. 58. The parties presented evidence and arguments before the Court in a hearing on December 20. *See* ECF No. 61. Accordingly, the Motion is now ripe for the Court’s review.

II. LEGAL STANDARD

A preliminary injunction is an “extraordinary remedy” and will be granted only if the movants carry their burden on all four requirements. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). The Court may issue a preliminary injunction if the movants establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) that the balance of hardships weighs in the movants’ favor; and (4) that the issuance of the preliminary injunction will not disserve the public interest. *See Daniels Health Servs., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013); *see also* Fed. R. Civ. P. 65. “The decision to grant or deny a preliminary injunction is discretionary with the district court.” *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985).

The movants must make a clear showing that the injunction is warranted, and the issuance of a preliminary injunction “is to be treated as the exception rather than the rule.” *Miss. Power & Light*, 760 F.2d at 621. “Only in rare instances is the issuance of a mandatory preliminary injunction proper.” *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979) (per curiam).

III. ANALYSIS

Plaintiffs ask the Court to enjoin Defendants from enforcing the vaccination policy, which they say violates RFRA and the First Amendment. Mot. 2, ECF No. 15; Pls.’ Br. 2, ECF No. 16. They also assert that the Defendants’ permanent medical-disqualification policy fails strict scrutiny. Defendants contend that Plaintiffs have not exhausted their intra-military remedies and that their claims are nonjusticiable. Even if these claims are reviewable, Defendants argue, a preliminary injunction would be inappropriate, because Plaintiffs are unlikely to succeed on the merits of their claims.

A. Jurisdiction and Reviewability

There are two threshold questions before the Court. The first is whether this Court has jurisdiction over the parties, and the second is whether Plaintiffs’ claims are justiciable under the *Mindes* test.

1. Relief Against President

Citing *Newdow v. Roberts*, Defendants argue this Court lacks jurisdiction to enjoin the President. 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.” (citation omitted)). “[W]e cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.” *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring in part). Defendants are correct. This Court has no declaratory or injunctive power against President Biden, and he is therefore **DISMISSED** as party to this case.

2. Justiciability Under *Mindes*

Defendants also argue that this case is nonjusticiable because Plaintiffs have not exhausted military remedies, and because they seek to have the Court intrude on internal military affairs. All

Plaintiffs have submitted religious accommodation requests. The Navy has denied twenty-nine of those requests. It has granted none. Defendants say the Court must wait for the Navy to decide each request.

As explained below, the record indicates the denial of each request is predetermined. As a result, Plaintiffs need not wait for the Navy to engage in an empty formality. In addition, whether the vaccine mandate violates Plaintiffs' First Amendment rights is a legal question well suited for the courts, not the Navy's administrative process. The Court finds that exhaustion is futile and will not provide complete relief, and therefore the case is justiciable.

Generally, courts refrain from reviewing internal military affairs. The rationale is simple: “[J]udges are not given the task of running the Army,” or, in this case, the Navy. *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). Some military issues, however, are appropriate for judicial review. The Fifth Circuit has developed a test to determine whether a given military issue is justiciable, and appropriate for judicial review. That test first requires plaintiffs to pass a two-part threshold test by showing (1) “an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations,” and (2) “exhaustion of available intraservice corrective measures.” *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971). Then, if both criteria are met, the Court weighs four factors to determine whether the issue is justiciable: (1) the nature and strength of the plaintiffs' challenge; (2) the potential injury to the plaintiffs if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. *Id.* at 201–02.

Before applying the *Mindes* test, the Court addresses Plaintiffs' argument that *Mindes* does not apply to RFRA. Plaintiffs suggest that applying *Mindes* here effectively reads an exhaustion

requirement into RFRA. *See* Pls.’ Reply 7–8, ECF No. 58. Plaintiffs confuse statutory exhaustion and judge-made exhaustion. When a statute imposes an exhaustion requirement, “Congress sets the rules.” *Ross v. Blake*, 578 U.S. 632, 639 (2016). Courts simply apply the text. They may not “add unwritten limits” or exceptions to the statute’s “rigorous textual requirements.” *Id.* If RFRA had an exhaustion requirement, the Court would apply it. But “judge-made exhaustion doctrines,” such as *Mindes*, are different. *Id.* The military exhaustion requirement in *Mindes* is a longstanding prudential doctrine that applies to constitutional, statutory, and regulatory claims involving “an ‘internal military decision.’” *Meister v. Tex. Adjutant Gen.’s Dep’t*, 233 F.3d 332, 340 (5th Cir. 2000). The out-of-circuit cases Plaintiffs cite are unpersuasive. They discuss whether RFRA requires exhaustion,⁹ or whether certain RFRA claims satisfy prudential ripeness analysis.¹⁰ They do not analyze whether *Mindes*, a “judicial abstention doctrine” for military issues, applies to RFRA. *Id.* at 339. Plaintiffs challenge internal military decisions, so, in this Circuit, the Court must apply *Mindes*.

a. The Two-Part Threshold Test

Having determined that *Mindes* applies, the Court turns to the two-part threshold test. Defendants agree that Plaintiffs satisfy the first part—they have alleged deprivation of their First Amendment rights and violations under RFRA. *See* Defs.’ Resp. 24, ECF No. 43. The parties dispute the second part—whether Plaintiffs have exhausted their military remedies.

The military exhaustion requirement is like other judge-made exhaustion doctrines. “The major purpose of the exhaustion doctrine is to prevent the courts from interfering with the

⁹ *Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016) (“RFRA certainly provides no textual support for the defendants’ position that the plaintiff is required to exhaust administrative remedies . . .”).

¹⁰ *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (declining “to read an exhaustion requirement into RFRA” for free exercise claims against the Drug Enforcement Administration).

administrative process until it has reached a conclusion.” *Von Hoffburg v. Alexander*, 615 F.2d 633, 637 (5th Cir. 1980). Military exhaustion is a matter of comity between the branches, “to maintain the balance between military authority and the power of federal courts.” *Id.* Application of the exhaustion requirement is therefore fact-intensive, requiring “an understanding of its purposes and of the particular administrative scheme involved.” *McKart v. United States*, 395 U.S. 185, 193 (1969). In contrast to statutory exhaustion requirements, “judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions.” *Ross*, 578 U.S. at 639. The Fifth Circuit has identified at least four such exceptions to military exhaustion: futility, inadequacy of administrative remedies, irreparable injury, and a substantial constitutional question. *Von Hoffburg*, 615 F.2d at 638.

First, plaintiffs need not exhaust military remedies “when resort to the administrative reviewing body would be futile.” *Hodges v. Callaway*, 499 F.2d 417, 420 (5th Cir. 1974). They are required to exhaust only those remedies that would “provide a real opportunity for adequate relief.” *Id.* For example, exhaustion is “obviously” futile when the administrative body does not have the authority to grant the relief sought. *Id.* at 420–21. In that situation, military relief is a legal impossibility. Similarly, exhaustion may be futile when military relief will not “obviate the need for judicial review.” *Id.* at 423. Although that “is not usually a reason for bypassing” the exhaustion requirement, *id.*, when the record all but compels the conclusion that the military process will deny relief, “exhaustion is inapposite and unnecessary,” *id.* at 420.

The facts overwhelmingly indicate that the Navy will deny the religious accommodations. The Navy has denied twenty-nine of Plaintiffs’ thirty-five accommodations requests.¹¹ Outside of Plaintiffs’ requests, the Navy has, to date, never granted a religious accommodation request for the

¹¹ Supp. Decl. of SEALs, SWCC, EOD, ND, Supp. App. 1023–1134.

COVID-19 vaccine.¹² In fact, in the past seven years, the Navy has never granted a single religious exemption for any vaccine.¹³ Several Plaintiffs have been directly told by their chains of command that “the senior leadership of Naval Special Warfare has no patience or tolerance for service members who refuse COVID-19 vaccination for religious reasons and wants them out of the SEAL community.”¹⁴

The Navy’s accommodation process confirms those fears. The Navy uses a fifty-step process to adjudicate religious accommodation requests.¹⁵ Under the standard operating procedures for the process, the first fifteen steps require an administrator to update a prepared disapproval template with the requester’s name and rank. In essence, the Plaintiffs’ requests are denied the moment they begin. That prepared letter is then sent to seven offices for review. After those offices review the disapproval letter, the administrator packages the letter with other religious accommodation requests for final signature. The administrator then prepares an internal memo to Vice Admiral John Nowell, asking him to “sign . . . letters *disapproving* immunization waiver requests based on sincerely held religious beliefs.”¹⁶

Then, at step thirty-five of the process, the administrator is told—for the first time—to read through the religious accommodation request. At that point, the disapproval letter has already been written, the religious accommodation request and related documents has already been reviewed by several offices, the disapproval has already been packaged with similar requests, and an internal memo has already been drafted requesting that Vice Admiral Nowell disapprove the religious accommodation request. The administrator is then tasked with reading the request and recording

¹² *Id.*

¹³ Pls.’ App. 295, ECF No. 17.

¹⁴ *Id.* at 879.

¹⁵ *See* Supp. Decl. of Andrew Stephens, Ex. 1, ECF No. 62.

¹⁶ *See id.*

any pertinent information in a spreadsheet. At no point in the process is the administrator given the opportunity to recommend anything other than disapproval. The materials are then sent to Vice Admiral Nowell. The entire process belies the manual's assertion that "[e]ach request is evaluated on a case by case basis."¹⁷

Defendants argue that the process is not futile. They say, "The fact that Plaintiffs may not anticipate a favorable outcome does not render the remedies futile." Defs.' Resp. 25, ECF No. 43. That dramatically understates the record. At the preliminary injunction hearing, counsel for Defendants suggested that exhaustion is not futile so long as the Navy has not denied the request. But that the Navy could hypothetically grant a request does not, on this record, "provide a real opportunity for adequate relief." *Hodges*, 499 F.2d at 420. Plaintiffs need not exhaust military remedies when doing so would be futile.

Second, plaintiffs need not exhaust military remedies when "available administrative remedies are inadequate" to grant him the relief he seeks. *Von Hoffburg*, 615 F.2d at 640. The inadequacy exception and futility exception sometimes overlap. For example, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). That the Navy has predetermined denial of the religious accommodations may indicate that the administrative process is both inadequate and futile. But the Fifth Circuit has distinguished the two exceptions. *See Von Hoffburg*, 615 F.2d at 640. That distinction is particularly salient here.

Even if the religious accommodations are granted, Plaintiffs will not receive the relief they seek. Again, the record is replete with examples. Those who receive religious accommodations are still "medically disqualified."¹⁸ That means Plaintiffs would be permanently barred from

¹⁷ *See id.*

¹⁸ Pls.' App. 159, 838, ECF No. 17.

deployment, denied the bonuses and incentive pay that accompany deployment, and deprived of the very reason they chose to serve in the Navy.¹⁹ By contrast, those receiving medical accommodations are not medically disqualified—they receive equal status as those who are vaccinated.²⁰ Some Plaintiffs were told by their chains of command that *if their religious accommodations were approved*, they would lose their SEAL Tridents.²¹ Others will lose their Tridents merely for requesting the exemption.²² Evidently, even successfully exhausting the religious accommodation process would not grant Plaintiffs the relief they seek. In some instances, it may invite more harm. At best, the available remedies would accord Plaintiffs second-class status in a peerless community. Thus, the available administrative remedies are inadequate.

The Fifth Circuit has discussed two more exceptions to the exhaustion requirement. These last two exceptions overlap somewhat with the first and second factors of the *Mindes* test, so the Court merely outlines them here. The third exception is that “exhaustion is not required when the petitioner may suffer irreparable injury if he is compelled to pursue his administrative remedies.” *Von Hoffburg*, 615 F.2d at 638. That resembles the second *Mindes* factor, which considers “[t]he potential injury to the plaintiff if review is refused.” *Mindes*, 453 F.2d at 201. The fourth exception to exhaustion is when “the plaintiff has raised a substantial constitutional question.” *Von Hoffburg*, 615 F.2d at 638. That inquiry raises the same issues as the first *Mindes* factor, the “nature and strength of the plaintiff’s challenge to the military determination,” which generally favors review of substantial constitutional questions. *Mindes*, 453 F.2d at 201. The Court discusses these issues in greater detail in the next section. Here, the Court simply notes that to the extent the analysis on

¹⁹ *Id.* at 928–29.

²⁰ *Id.* at 159, 838.

²¹ *E.g., id.* at 906, 1021.

²² *E.g., id.* at 892, 900.

those factors weighs in favor of judicial review, it also favors excusing the military exhaustion requirement.

At least four recognized exceptions to the exhaustion requirement apply. If one is insufficient, the combination of the four readily supports the Court's finding that the traditional justifications for military exhaustion are not served by the Navy's religious accommodation process. Plaintiffs have therefore satisfied parts one and two of the threshold *Mindes* test.

b. The Four *Mindes* Factors

Having passed the threshold test, Plaintiffs must next show that the four *Mindes* factors weigh in favor of justiciability. The factors are (1) the nature and strength of the plaintiff's challenge; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. *Mindes*, 453 F.2d at 201–02.

First, the nature and strength of Plaintiffs' claims weigh in favor of judicial review. As to the nature of the claim, “[c]onstitutional claims [are] normally more important than those having only a statutory or regulatory base.” *Id.* at 201–02. But “not all constitutional claims are to be weighed equally.” *NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980). Courts tend to favor review of constitutional claims “founded on infringement of specific constitutional rights, such as the Fifth Amendment privilege against self-incrimination or the First Amendment freedoms of speech and press,” as opposed to constitutional claims that, for example, “a serviceman’s due process rights were violated by arbitrary and capricious official action.” *Id.* Plaintiffs move for a preliminary injunction based on specific violations of their constitutional rights under the Free

Exercise Clause, plus similar violations of RFRA. Plaintiffs’ claims are squarely in the category of claims most favorable to judicial review.²³

Moreover, Plaintiffs’ claims are strong. “An obviously tenuous claim of any sort must be weighted in favor of declining review.” *Mindes*, 453 F.2d at 201. The Court discusses the strength of Plaintiffs’ claims in Section III.B as part of the preliminary injunction analysis. As a brief preview, the vaccine mandate fails strict scrutiny. The mandate treats comparable secular activity (e.g., medical exemptions) more favorably than religious activity. First, the Navy has granted *only* secular exemptions—it has never granted a religious exemption from the vaccine. Second, even if the Navy were to grant a religious exemption, that exemption would still receive less favorable treatment than its secular counterparts. Those who receive religious exemptions are medically disqualified. Those who receive medical exemptions are not. But the activity itself—forgoing the vaccine—is identical. Given the irrationality of the mandate, “[i]t is unsurprising that such litigants are entitled to relief.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (per curiam). Under the first *Mindes* factor, the Plaintiffs have shown that the nature and strength of their claims weigh strongly in favor of judicial review.

Second, the potential injury to Plaintiffs if review is refused weighs in favor of judicial review. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably

²³ As mentioned in the previous section, that Plaintiffs raise substantial constitutional claims also warrants excusing the military exhaustion requirement. See *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir. 1980); see also, e.g., *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973) (excusing administrative exhaustion because “[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board”); *Roe v. Shanahan*, 359 F. Supp. 3d 382, 403 (E.D. Va. 2019) (excusing military exhaustion of due process and Administrative Procedure Act claims because the Air Force Board for Correction of Military Records “cannot adjudicate a claim that the Air Force’s policies and regulations themselves are unconstitutional or otherwise unlawful”), *aff’d sub nom. Roe v. Dep’t of Def.*, 947 F.3d 207 (4th Cir. 2020); *Adair v. England*, 183 F. Supp. 2d 31, 55 (D.D.C. 2002) (excusing military exhaustion when “the gravamen of the plaintiffs’ claims revolves around constitutional challenges based on the First Amendment’s Establishment and Free Exercise Clauses and the Fifth Amendment’s Due Process Clause”), *aff’d sub nom. In re Navy Chaplaincy*, No. 19-5204, 2020 WL 11568892 (D.C. Cir. Nov. 6, 2020).

constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). This factor overlaps with the preliminary injunction analysis, so (again) the Court does not discuss it at length here. Two points bear mention. First, Plaintiffs are currently suffering injury while waiting for the Navy to adjudicate their requests. Plaintiffs have been declared nondeployable and suffer withheld promotions and travel.²⁴ In one egregious example, Navy SEAL 26 was approved for a four-week program in Maryland to treat deployment-related traumatic brain injury.²⁵ He told his commanding officer that he could travel in his own vehicle to the medical facility, which did not have a vaccine requirement for its patients. His commanding officer told him he was not allowed to travel because he was unvaccinated. SEAL 26 missed the opportunity to receive treatment, despite his pending religious accommodation request. Second, some Plaintiffs have suffered injury *because* they submitted religious accommodation requests. Many Plaintiffs have been told that merely requesting a religious accommodation will result in their removal from the Naval Special Warfare community and loss of their Trident.²⁶ Withholding judicial review is particularly illogical when participation in the administrative process invites the very harm Plaintiffs seek to avoid.

Third, the type and degree of anticipated interference with the military function weighs in favor of judicial review. “[I]f the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.” *Mindes*, 453 F.2d at 201. Defendants argue that judicial review would interfere with the military’s decisions regarding duty assignments and medical fitness. *See* Defs.’ Resp. 28–30, ECF No. 43. But “[i]nterference per se is insufficient since there will always be some interference when review is granted.” *Mindes*, 453 F.2d at 201. Over 99% of active-duty Navy servicemembers are fully vaccinated against COVID-

²⁴ Pls.’ App. 876–1022, ECF No. 17.

²⁵ Supp. Decl. of Navy SEAL 26 at 2, ECF No. 63.

²⁶ *E.g.*, Pls.’ App. 878–79, 892, 900, 906, 915, ECF No. 17.

19.²⁷ Plaintiffs are part of a vanishingly small 0.6%. The Navy already provides secular accommodations. Whether denying religious accommodations violates the First Amendment is a distinct legal question that would not “seriously impede the military in the performance of vital duties.” *Id.*

Fourth, the extent to which the exercise of military expertise or discretion is involved weighs in favor of review. “Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.” *Mindes*, 453 F.2d at 201–02. This is not a suit in which “commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions.” *United States v. Shearer*, 473 U.S. 52, 58 (1985). Neither does this case involve “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force.” *Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (citation and internal quotation marks omitted). Whether the vaccine mandate passes muster under the First Amendment and RFRA requires neither “military expertise or discretion.” *Mindes*, 453 F.2d at 201. It is a purely legal question appropriate for judicial review.

In sum, all four *Mindes* factors favor justiciability. To be sure, “courts must—at least initially—indulge the optimistic presumption that the military will afford its members the protections vouchsafed by the Constitution, by the statutes, and by its own regulations.” *Hodges*, 499 F.2d at 424. But they need not indulge that presumption to the point of absurdity. The record overwhelmingly demonstrates that the Navy’s religious accommodation process is an exercise in futility. Plaintiffs need not wait for the Navy to rubber stamp a constitutional violation before

²⁷ *Id.* at 284.

seeking relief in court. And this is precisely the type of legal challenge that *Mindes* contemplates is appropriate for the courts to decide. Plaintiffs' claims are justiciable.

B. Plaintiffs are likely to succeed on the merits.

Having established that Plaintiffs' claims are justiciable, the Court must consider the first of the four requirements under the preliminary injunction standard: whether Plaintiffs have established a "substantial likelihood of success on the merits." *Daniels Health Scis.*, 710 F.3d at 582. In their motion, Plaintiffs make two substantive claims. First, they allege the vaccine mandate violates RFRA and the First Amendment. Second, they allege the mandate's permanent medical-disqualification provision fails strict scrutiny.

The Court concludes Plaintiffs are likely to succeed on both claims. Because the mandate treats those with secular exemptions more favorably than those seeking religious exemptions, strict scrutiny is triggered, and Defendants fail to show a compelling interest with respect to the servicemembers before the Court.

1. Religious Freedom Restoration Act

Plaintiffs allege that the vaccine mandate substantially burdens their religious exercise without satisfying the compelling interest required under RFRA. Defendants respond that even if Plaintiffs' beliefs are substantially burdened, the Navy has a compelling interest in keeping its force fit and responsive to national security threats. And while Defendants assert that vaccination is the least restrictive means to achieve this end, Plaintiffs suggest alternatives exist. The Court concludes that Defendants have not demonstrated a compelling interest justifying the substantial burden imposed on the Plaintiffs' religious beliefs. Therefore, there is no need to discuss narrow tailoring.

The Religious Freedom Restoration Act “was designed to provide very broad protection for religious liberty.” *Hobby Lobby*, 573 U.S. 682, 706 (2014). Passed in 1993 with nearly unanimous support, RFRA provides that the:

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1. RFRA extends to the military, because under the text of the statute, “government” includes any “branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States.” *Id.* § 2000bb-2. Defendants do not dispute this.

Defendants have substantially burdened Plaintiffs’ religious beliefs. The government burdens religion when it “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Thomas v. Rev. Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981). That is especially true when the government imposes a choice between one’s job and one’s religious belief. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Here, Plaintiffs must decide whether to lose their livelihoods or violate sincerely held religious beliefs. Because they will not compromise these religious beliefs, Plaintiffs have been threatened with separation from the military and other disciplinary action. Supp. App. 1032, 1096, 1107, 1126, ECF No. 59; Compl., Ex. 3, ECF No. 1-3.

Because the Plaintiffs have demonstrated a substantial burden, Defendants must show that this burden furthers a compelling interest using the least restrictive means.

Plaintiffs claim Defendants cannot demonstrate a compelling interest as to these particular servicemembers. Although they acknowledge that preventing the spread of COVID-19 was, at one time, a compelling interest, Plaintiffs argue that an indefinite state of emergency cannot justify this

compelling interest two years into the pandemic. Pls.’ Br. 23–24, ECF No. 16. In response, Defendants argue that the Navy has a vital national security interest in keeping its force healthy and ready to deploy. Because Plaintiffs are members of Special Operations teams, these individuals must stay healthy to carry out highly specialized missions. Defs.’ Resp. 33, ECF No. 43.

Although “[s]temming the spread of COVID-19 is unquestionably a compelling interest,” its limits are finite. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). Courts must “look beyond broadly formulated interests,” and instead consider the “asserted harm of granting specific exemptions to particular religious claimants.” *Hobby Lobby*, 573 U.S. at 726–27 (cleaned up) (internal quotations omitted). In other words, Defendants must provide more than a broadly formulated interest in “national security.”²⁸ They must articulate a compelling interest in vaccinating the thirty-five religious servicemembers currently before the Court.

Without individualized assessment, the Navy cannot demonstrate a compelling interest in vaccinating these particular Plaintiffs. By all accounts, Plaintiffs have safely carried out their jobs during the pandemic. Prior to the vaccine mandate, at least six Plaintiffs conducted large-scale trainings and led courses without incident. Supp. Decl. of SEALs 2–3, 7, 15; SWCC 1; EOD 1. Despite Defendants’ dismissive remark that Plaintiffs’ roles “obviously are not amenable to telework,” at least two Plaintiffs have routinely done so. Defs.’ Resp. 34, ECF No. 43; Supp. Decl. of SEAL 12, SWCC 5; Supp. Decl. of SEAL 21. Eleven Plaintiffs successfully deployed. Supp. Decl. of SEALs 4–6, 9, 13, 22–23, 26; SWCC 2, 4; EOD 1. The Navy even awarded one Plaintiff

²⁸ Defendants cite an inapplicable case on the Religious Land Use and Institutionalized Persons Act to assert that “RFRA must be applied ‘with particular sensitivity to security concerns.’” Defs.’ Resp. 32, ECF No. 43 (quoting *Cutter v. Wilkinson*, 544 U.S. 722, 723 (2005)). Defendants also cite nonbinding dicta for the proposition that courts are “reluctant to interpret statutes in ways that allow litigants to interfere with the mission of our nation’s military.” *Lebron v. Rumsfeld*, 670 F.3d 540, 557–58 (4th Cir. 2012). But as previously discussed in the *Mindes* analysis, “[i]nterference per se is insufficient since there will always be some interference when review is granted.” *Mindes*, 453 F.2d at 201.

the Joint Service Commendation Medal for “safely navigating restricted movement and distancing requirements” under COVID-19 protocol in early 2020. Hr’g Test. of EOD 1, Hr’g Ex. 26.

Even if Defendants have a broad compelling interest in widespread vaccination of its force, they have achieved this goal without the participation of the thirty-five Plaintiffs here. At least 99.4% of all active-duty Navy servicemembers have been vaccinated. Pls.’ App. 284, ECF No. 17. The remaining 0.6% is unlikely to undermine the Navy’s efforts. Today, Plaintiffs present a lower risk of infection and transmission than in the earlier days of the pandemic. Several Plaintiffs have tested positive for antibodies, showing the presence of natural immunity. *See* Decl. of SEALs 10, 22; SWCC 2, 4; Supp. Decl. of SEAL 12. With a 99.4% vaccination rate, the Navy’s herd immunity is at an all-time high. COVID-19 treatments are becoming increasingly effective at reducing hospitalization and death. *See* Pfizer Novel COVID-19 Oral Antiviral Treatment Study, Pls.’ App. 310.

Moreover, the Navy is willing to grant exemptions for non-religious reasons. Its mandate includes carveouts for those participating in clinical trials and those with medical contraindications and allergies to vaccines. Pls.’ App. 154–59. Because these categories of exempt servicemembers are still deployable, a clinical trial participant who receives a placebo may find himself ill in the high-stakes situation that Defendants fear. Defs.’ Resp. 34, 48, ECF No. 43. As a result, the mandate is underinclusive. “Indeed, underinclusiveness . . . is often regarded as a telltale sign that the government’s interest in enacting a liberty-restraining pronouncement is not in fact ‘compelling.’” *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604, 616 (5th Cir. 2021).

For these reasons, the Court finds that Defendants do not demonstrate a compelling interest to overcome the Plaintiffs' substantial burden. Without a compelling interest, the Court need not address whether Defendants have used the least restrictive means.

2. First Amendment

The Court turns now to the Plaintiffs' First Amendment claim. Plaintiffs argue that the Navy's mandate triggers strict scrutiny, because it is not neutral or generally applicable. Defendants insist they have carried their burden to demonstrate their compelling interest and the least restrictive means. The Court finds that for the same reasons Plaintiffs succeed on their RFRA claim, they also prevail on their First Amendment claim.

To assess neutrality and general applicability, courts consider both the structure of the law and any disparate outcomes it creates. "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) (cleaned up). "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296 (citing *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67–68).

The Navy's mandate is not neutral and generally applicable. First, by accepting individual applications for exemptions, the law invites an individualized assessment of the reasons why a servicemember is not vaccinated. *See* Pls.' App. 153–55 (NAVADMIN 190/21) (describing the exemption process and authority to grant exemption). Consequently, favoritism is built into the mandate.

Second, the "comparable secular activity" includes refusing the vaccine for medical reasons or participation in a clinical trial. These medically exempt, unvaccinated servicemembers

are immediately deployable while unvaccinated servicemembers with religious objections are not. *See* MANMED § 15-105(3)(n)(9); Pls.’ App. 838. Defendants justify this discrepancy by contrasting the number of requests: “Whereas there are only seven permanent medical exemptions for all Navy and Reserve personnel from the COVID-19 immunization duty, there are more than three thousand pending requests for a religious exemption” Defs.’ Resp. 35 (citation omitted). But an influx of religious accommodation requests is not a valid reason to deny First Amendment rights. No matter how small the number of secular exemptions by comparison, *any* favorable treatment—in this case, deployability without medical disqualification—defeats neutrality. For these reasons, the mandate triggers strict scrutiny under the First Amendment.

As discussed in Section III.B.1, Defendants fail to satisfy the compelling interest requirement, so there is no need to consider least restrictive means. The Court will not repeat its strict scrutiny analysis here. Plaintiffs have established a substantial likelihood of success on the merits of their RFRA and First Amendment claims, satisfying the first requirement of the preliminary injunction standard.

3. Medical-Disqualification Provision

The parties’ briefing on the medical-disqualification issue echoes the RFRA and First Amendment analysis discussed at length in Sections III.B.1 and III.B.2 above. In short, the Court finds that, for the same reasons Plaintiffs’ RFRA and First Amendment challenges to the mandate itself succeed, Plaintiffs’ challenge to the medical-disqualification provision follows.

A servicemember with a religious accommodation is permanently medically disqualified while a servicemember with a medical exemption is not. *See* MANMED § 15-105(3)(n)(9); Pls.’ App. 838. In other words, Plaintiffs—even if they were all to be granted religious accommodations immediately—would remain nondeployable and would be forced to seek a medical waiver to have this penalty removed. In short, this disparate treatment triggers strict scrutiny.

Defendants are unable to overcome strict scrutiny because they have not presented a compelling interest, as explained in previous sections. Thus, Plaintiffs are substantially likely to succeed on the merits of their medical-disqualification challenge.

C. Plaintiffs face a substantial threat of irreparable harm.

Under the second prong of the preliminary injunction standard, the movants must establish a substantial threat of irreparable harm. Here, Plaintiffs argue they have suffered irreparable injury based on (1) infringement of religious liberties; (2) their nondeployable status, which reduces pay and advancement opportunities; and (3) the threat of court-martial and dishonor accompanying it. Defendants claim that Plaintiffs' harm is merely speculative because the religious exemption requests have not been finally adjudicated. Defendants also argue that Plaintiffs have improperly relied on *BST Holdings*, which applies only to civilian employment.

It is incorrect to say that Plaintiffs' harm is merely speculative at this stage. Plaintiffs are already suffering injury while waiting for the Navy to adjudicate their requests. In some cases, Plaintiffs have suffered injury *because* they seek religious accommodation. Plaintiffs testify that they have been barred from official and unofficial travel, including for training²⁹ and treatment for traumatic brain injuries;³⁰ denied access to non-work activities, like family day;³¹ assigned unpleasant schedules and low-level work like cleaning;³² relieved of leadership duties and denied opportunities for advancement;³³ kicked out of their platoons;³⁴ and threatened with immediate

²⁹ Supp. Decl. of SEAL 16, Supp. App. 1069; Supp. Decl. of SWCC 5, Supp. App. 1121.

³⁰ Supp. Decl. of SEAL 3, Supp. App. 1032; Supp. Decl. of SEAL 26, ECF No. 63.

³¹ Supp. Decl. of SEAL 26, Supp. App. 1103.

³² Supp. Decl. of SEAL 21, Supp. App. 1084; Supp. Decl. of SEAL 25, Supp. App. 1100.

³³ Supp. Decl. of SEAL 22, Supp. App. 1088; Supp. Decl. of SEAL 3, Supp. App. 1032; Supp. Decl. of SWCC 4, Supp. App. 1118; Supp. Decl. of EOD 1, Supp. App. 1126.

³⁴ Supp. Decl. of SEAL 21, Supp. App. 1084; Supp. Decl. of SEAL 25, Supp. App. 1100.

separation.³⁵ At least one Plaintiff has received an email for enrollment in the TAP course, a prerequisite for separation from the Navy.³⁶

While significant and life-altering, these harms do not, by themselves, rise to the level of irreparable injury. “In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages.” *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). As Defendants note, even a general discharge from the military—the ultimate threat here—is not an irreparable harm. *See McCurdy v. Zuckert*, 359 F.2d 491, 494 (5th Cir. 1966). No matter how remote the possibility, Plaintiffs could be compensated for their losses. They could be reinstated with backpay, retroactively promoted, or reimbursed for lost benefits like medical insurance and the GI Bill.

But because these injuries are inextricably intertwined with Plaintiffs’ loss of constitutional rights, this Court must conclude that Plaintiffs have suffered irreparable harm. Plaintiffs have suffered the more serious injury of “infringement of their religious liberty rights under RFRA and the First Amendment” Pls.’ Br. 28, ECF No. 16. The crisis of conscience imposed by the mandate is itself an irreparable harm. *See BST Holdings*, 17 F.4th at 618; *Sambrano v. United Airlines*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting) (citing *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974)). “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373 (plurality opinion). The same is true of RFRA. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). Thus, any losses the Plaintiffs have suffered in connection with their religious accommodation requests sufficiently demonstrate irreparable injury.

³⁵ Supp. Decl. of SEAL 24, Supp. App. 1096; Supp. Decl. of SEAL 3, Supp. App. 1032; Supp. Decl. of SWCC 1, Supp. App. 1107; Supp. Decl. of EOD 1, Supp. App. 1126.

³⁶ Test. of SEAL 3, Hr’g Ex. 9.

Finally, Defendants allege that Plaintiffs' reliance on *BST Holdings* is improper "as the OSHA requirement at issue in that case applies to civilian employers, not service members." Defs.' Resp. 45, ECF No. 43. But the principle the Supreme Court articulated in *Elrod v. Burns* applies broadly, and the Fifth Circuit has acknowledged that any loss of First Amendment freedom satisfies the irreparable injury requirement, even in the national security context. *See Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 457 (5th Cir. 2016).

Thus, the second requirement for injunctive relief has been satisfied.

D. The balance of hardships weighs in Plaintiffs' favor, and the issuance of the preliminary injunction will not disserve the public interest.

The final two elements of the preliminary injunction standard—the balance of the harms and whether an injunction will disserve the public interest—must be considered together. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). When balancing the harms, courts must consider whether the movant's injury outweighs the threatened harm to the party whom they seek to enjoin. The public interest element is broader in scope.

Plaintiffs seek to preserve the status quo. They argue the balance of harms tips in Plaintiffs' favor, and an injunction is always in the public interest when it prevents deprivation of constitutional rights. Pls. Br. 29, ECF No. 16; *see Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014). By contrast, Defendants claim that an injunction will cause the Navy significant harm, including illness, hospitalization, and death among its ranks. Given the public interest in military readiness and national defense, they argue, the injunction should be denied.

This Court does not make light of COVID-19's impact on the military. Collectively, our armed forces have lost 80 lives to COVID-19 over the course of the pandemic. Defs.' App. 263,

ECF No. 44-3. But the question before the Court is not whether a public interest exists. Rather, this Court must address whether an injunction will disserve the public interest. An injunction does not disserve the public interest when it prevents constitutional deprivations. *Jackson Women's Health*, 760 F.3d at 458 n.9.

The Plaintiffs' loss of religious liberties outweighs any forthcoming harm to the Navy. Even the direst circumstances cannot justify the loss of constitutional rights. Fortunately, the future does not look so dire. Nearly 100% of the Navy has been vaccinated. Hospitalizations are rising at a much slower rate than COVID-19 cases. COVID-19 treatments are becoming more effective and widely available.

Thus, Plaintiffs have satisfied the final two requirements for preliminary injunction.

IV. CONCLUSION

For the reasons stated, the Motion for Preliminary Injunction is **GRANTED**. Defendants are enjoined from applying MANMED § 15-105(3)(n)(9); NAVADMIN 225/21; Trident Order #12; and NAVADMIN 256/21 to Plaintiffs. Defendants are also enjoined from taking any adverse action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation. Mot. 2–3, ECF No. 15.

SO ORDERED on this **3rd day of January, 2022**.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

EXHIBIT 5

U.S. Navy COVID-19 Updates



You are at the official site for Navy information and updates on Coronavirus Disease 19 (COVID-19). Visit frequently to learn about the latest policies, leadership messages, and guidance on how to protect yourself, your family, and your Shipmates.

[Department of the Navy Return to the Workplace COVID-19 Guidance and Resources 2020](#) (updated July 28, 2020) (PDF). Information to assist the military and civilian employees on workforce management, reporting, testing, personnel protection, telework policy, travel and more. Information is subject to change. Consult the following links for updated guidance: [ALNAV](#) Library, [NAVADMIN](#) Library, and [MARADMIN](#) Library.

NEED TO A REPORT COVID-19 CASE?

Go to MyNavy Portal at - <https://www.mnp.navy.mil/group/navy-covid-19-reporting> (CAC Enabled)

If you have any questions or experience any difficulties please contact the OPNAV COVID Cell via email OPNAV_COVID_CRISIS_RESPONSE_CELL@navy.mil or by phone at (703) 571-2822.

- For Navy-specific questions related to COVID-19 numbers and vaccination data, please email PTGN_CHINFONEWSDESK@NAVY.MIL.

NAVY COVID-19 UPDATE

March 31, 2022

- As of March 30, 2022, 4,282 active component and 3,267 Ready Reserve service members remain unvaccinated.
- As a result of the recent class action certification and corresponding injunction issued by the U.S. District Court for the Northern District of Texas, [NAVADMIN 083/22](#), released March 30, 2022, suspends separation processing and adverse administrative consequences for Navy service members who submitted requests for religious accommodation from the COVID-19 vaccine requirement.
- As of March 24, 2022, there have been 732 separations for refusing the COVID-19 vaccine.
 - There have been 689 Active Component Sailors and 21 Reserve Component Sailors separated, all with an honorable characterization of service. Guidance for separating Navy service members refusing the vaccine was set by the COVID-19 Consolidated Disposition Authority and is detailed in [NAVADMIN 283/21](#).
 - There have been 22 Entry Level Separations (ELS). In accordance with the Naval Military Personnel Manual (MILPERSMAN) [1910-154](#) and [NAVADMIN 225/21](#), this reflects service members who, since the time of the vaccine mandate, were separated during initial training periods within their first 180 days of active duty.
- Nine religious accommodation requests for members of the Individual Ready Reserve (IRR) have been conditionally approved. A conditional approval means that the individual is not required to be vaccinated while in the IRR, but must be fully vaccinated as defined in [NAVADMIN 190/21](#).

[Skip to main content](#) (Press Enter).

- As of March 30, 2022, active duty service members currently have 13 permanent medical exemptions, 207 temporary medical exemptions, 23

- As of March 30, 2022, ready reserve service members currently have one permanent medical exemption, 10 temporary medical exemptions, 12



vaccine

- On Dec. 22, [NAVADMIN 289/21](#) was released outlining guidance encouraging COVID-19 vaccine boosters.

	Cases	Hospitalized	Recovered	Deaths	Cumulative Total COVID Cases*
MIL	1,860	2	87,914	17	89,791
CIV	2,222	9	40,478	119	42,819
DEP	388	0	10,364	7	10,759
CTR	305	1	11,708	49	12,062
TOTAL	4,775	12	150,464	192	155,431

* Active Cases + Recovered + Deaths = Cumulative Total COVID Cases

UNVACCINATED

	Active Duty	Ready Reserve
Unvaccinated	4,282	3,267
Religious Accommodation Request	3,323	864

APPROVED EXEMPTIONS

	Active Duty	Ready Reserve
Permanent Medical	12	1
Temporary Medical	207	10
Religious Accommodation	0	0

- In accordance with Navy mandatory COVID-19 vaccination and reporting policy guidance, the deadline for active-duty Navy service members to be fully vaccinated was Nov. 28, 2021. Ready Reserve Navy service members will be fully vaccinated by Dec. 28, 2021. New accessions will be fully vaccinated as soon as practicable following service entry.
- In order to ensure a fully vaccinated force, U.S. Navy policy is to process for separation all Navy service members who refuse the lawful order to receive the COVID-19 vaccination and do not have an approved exemption. All waiver requests are reviewed on a case-by-case basis and each request will be given full consideration with respect to the facts and circumstances submitted in the request.
- The Navy issued a [press release](#) outlining guidance to commands for service members who refuse to comply with the service's order mandating all active-duty and reserve members be fully vaccinated against COVID-19 in [NAVADMIN 256/21](#), released Nov. 15, 2021.

Definitions:

- Fully Vaccinated: Per [NAVADMIN 190/21](#), Navy service members are considered fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose COVID-19 vaccine. Booster shots are still under evaluation and will be addressed via separate message.
Skip to main content (Press Enter).

- Unvaccinated: Per [NAVADMIN 249/21](#), this includes Navy service members who:

- are pending medical exemption,



- have not had access to the vaccination due to operational schedule and/or remote location.
- Medical: Medical exemptions will be determined by health care providers based on the health of the requestor, and the nature of the immunization under consideration in line with [BUMEDINST 6230.15B](#) and [MILPERSMAN 1730-020](#).
- Administrative (Admin): To include Permanent Change of Station (PCS), Emergency Leave, Separation, and Admin Temporary, etc.
 - Admin PCS: For individual already checked out of the command due to permanent change of station and awaiting to be gained at their next command. (Individuals should be vaccinated prior to permanent change status whenever possible).
 - Admin Temporary: For individual that is operationally unavailable for vaccination. For example, deployed to a location or region where the mandatory vaccine is unavailable.
- Religious Accommodation: A religious accommodation is a category of administrative exemptions that provides an accommodation to a service member for an otherwise applicable military policy, practice, or duty. In accordance with The Religious Freedom Restoration Act, if such a military policy, practice or duty substantially burdens a service member's exercise of religious, accommodation unless:
 1. The military policy, practice, or duty is in furtherance of a compelling governmental interest (e.g. mission accomplishment, safety, force health).
 2. It is the least restrictive means of furthering that compelling governmental interest.

For more information, including frequently asked questions and Navy instructions, visit <https://www.mynavyhr.navy.mil/Support-Services/Religious-Accommodations/>

Hyperlinks to Navy Administrative Messages:

- NAVADMIN 042/22: [Updated COVID Consolidated Disposition Authority Data Reporting Requirements and Lessons Learned](#)
- NAVADMIN 007/22: [U.S. Navy COVID-19 Standardized Operational Guidance 5.0](#)
- NAVADMIN 289/21: [Guidance Encouraging COVID-19 Vaccine Booster](#)
- NAVADMIN 283/21: [CCDA Execution Guidance to Commanders](#)
- NAVADMIN 256/21: [COVID-19 Consolidated Disposition Authority \(CCDA\) Guidance to Commanders](#)
- NAVADMIN 249/21: [CCDA Reporting Requirements](#)
- NAVADMIN 225/21: [COVID-19 Consolidated Disposition Authority \(CCDA\)](#)
- ALNAV 062/21: [Department of the Navy Mandatory COVID-19 Vaccination Policy](#)
- NAVADMIN 190/21: [2021-2022 Navy Mandatory COVID-19 Vaccination and Reporting Policy](#)

Go to the Links below for more information

- [Operational Guidance](#)
- [NAVADMINs](#)
- [ALNAVs](#)
- [ALNAVRESFOR](#)
- [MyNavyHR Videos](#)
- [Navy.mil Releases](#)
- [Supporting Video](#)
- [DoD, Navy Leadership Statements](#)
- [TRANSCOM Release](#)

■ [More Resources](#)
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EXHIBIT 6

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BRYAN P. SPENCE, TYLER W. STEF,
RYAN CORCORAN, MITCHELL B. PIKE,
STEVEN R. HAYNES, ANDREW GRIEB,
DANIELLE A. RUNYAN, CHRISTOPHER M.
WU, and ALAN SOSEBEE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity
as United States Secretary of Defense,
THE UNITED STATES DEPARTMENT OF
DEFENSE, and FRANK KENDALL, in his official
capacity as United States Secretary of the Air Force,

Defendants.

Case No: 22-

DECLARATION OF LIEUTENANT COLONEL BRYAN PATRICK SPENCE

Pursuant to 28 U.S.C. §1746, I, Lieutenant Colonel Bryan Patrick Spence, under penalty of perjury, declare as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I presently reside in Texas.
3. I have served as a Department of the Air Force (“Air Force”) active-duty service member since May 28, 2003. I transitioned to the reserves in 2014.
4. Over the course of my career, I have received the following awards: Meritorious Service Medal, Air Medal with 4 Oak Leaf Clusters, Aerial Achievement Medal, Air Force Commendation Medal with Oak Leaf Cluster, Meritorious Unit Award, AF Outstanding Unit Award with 4 Oak Leaf Clusters, and Combat Readiness Medal with 4 Oak Leaf Clusters.
5. I have also been considered a top performer amongst my peers with numerous accolades such as Top Gun awards, Company Grade Officer awards, Flight Commander of the Year, outstanding flight check rides, mission commander, considered the “Subject Matter Expert” in enemy Integrated Air Defense Networks, and was designated as a “Distinguished Graduate” during the course of my Professional Military Education at Maxwell Air Force Base.
6. I am an instructor pilot and mission commander in the F-16. As a combat F-16 fighter pilot, I have deployed numerous times in support of operations across the globe. Namely, two deployments to Iraq 2007 and 2008, one to Afghanistan in 2016, another to Pakistan in 2011, Romania in 2018, and even an exchange tour to Poland in 2017. During one deployment to Iraq, I promoted to the rank of Captain, which was captured as a notable event in the Air Force Times. <https://www.f-16.net/f-16-news-article2367.html>. I have

accumulated nearly 2,500 hours of F-16 flight time, of which over 550 are combat hours providing close air support to our troops on the ground. To borrow the phrase; it is the lion's share of flight experience in the F-16.

7. At no time during my career have I received any form of punishment or reprimand.
8. I am presently assigned to Naval Air Station Joint Reserve Base Fort Worth, Texas, where my job title is F-16 Instructor Pilot. I have been assigned to that unit since September 2014.
9. On August 24, 2021, the Secretary of Defense issued a mandate for all members of the Armed Forces under Department of Defense authority on active duty or in the Ready Reserve, including the National Guard, to immediately begin full vaccination against COVID-19.
10. On September 3, 2021, the Secretary of the Air Force issued a similar mandate ("COVID-19 Vaccine Mandate") requiring that commanders in the Air Force take all steps necessary to ensure all uniformed Airmen and Guardians received the COVID-19 vaccine, which included issuing unit-wide and individual orders to their military members.
11. On October 5, 2021, my commander issued me an order to receive the COVID-19 vaccine.
12. In response to the COVID-19 Vaccine Mandate, service members were permitted to submit a request for either a religious or medical exemption.
13. On October 12, 2021, I submitted a Religious Accommodation Request ("RAR") to be exempted from the COVID-19 vaccine requirement.

14. In my RAR, I requested a religious accommodation from immunizations which utilize aborted fetal tissue in their development, manufacturing, testing, or research. Additionally, I sought exemptions from immunizations that alter the body's natural process for acquiring immunity by using synthetic or artificial processes. This appeal is not seeking exemption from all immunizations, only those narrowly defined above.
15. My turning point came after the death of my newborn daughter Vaea in January 2021 after my wife contracted COVID-19. A few months after my daughter's death, my wife and I visited a memorial Cook's Children Hospital established to immortalize children like my daughter who died, but through their organ donations, could save the lives of others. Surrounding the name of my daughter are the names of hundreds of children; each with their own story of grieving parents. Through the death of my daughter, I realized that I can no longer turn a blind eye to the pain that our Father in heaven must feel when he sees the senseless death of innocent children to create or develop these vaccines.
16. In light of the vaccine mandates that threaten, "vaccinate or lose your job," I am reminded of scripture. In Revelations 13:17, it is clear that during the end of days, "No one can buy or sell or engage in commerce, unless he has the mark." Without these vaccines, society is saying that we cannot travel, eat in local restaurants, or even hold a job without them. In essence; engage in commerce. While the mark is not fully defined, I sincerely believe that vaccines will lead to the mark of the beast known throughout the book of Revelation. My hope is to abstain from actions that would condone the mark and lead those who are not yet believers down a path which ultimately would condemn them to hell, separated from Christ, for eternity. Scripture is clear to those that would take the

mark of the beast, “He also will drink the wine of God’s wrath, poured full strength into the cup of his anger, and he will be tormented with fire and sulfur in the presence of the holy angels and in the presence of the Lamb. And the smoke of their torment goes up forever and ever, and they have no rest, day or night, these worshipers of the beast and its image, and whoever receives the mark of its name.” Revelation 14:10-11. It is unknown if I have natural immunity, but I currently have not been infected despite constant exposure to my wife and child in the NICU, both of whom were COVID positive.

17. As a requirement of the RAR process, on or about October 24, 2021, I was interviewed by the 301 FW/Wing Chaplain regarding my sincerely held religious beliefs.
18. On October 24, 2021, the chaplain determined that my religious beliefs were sincere.
19. As an additional requirement of the RAR process, on October 17, 2021, I was counseled by Lieutenant Colonel Jason Rogers, 301FW Medical Group, about the risks of not being vaccinated and becoming ill with COVID-19.
20. On October 20, 2021, I was counseled by my commander that noncompliance with immunization requirements may adversely affect readiness for deployment, assignment, international travel, or result in other administrative consequences. “Administrative consequences” include adverse administrative actions such as, Letters of Admonishment, Letters of Counseling, and Letters of Reprimand, which, if received, would detrimentally impact my career and could negatively impact my chances of promoting to the next rank.
21. In addition to administrative consequences, I could face nonjudicial punishment, which is a career ender. I would not be able to promote further despite a promising career to this point. I would no longer be considered for command, nor for career broadening educa-

tional experiences. To use the vernacular, I would have a scarlet letter on my record. The DoD has indicated that an increasing level of pressure will be implemented to encourage vaccination, but ultimately resulting in discharge from the military, or in my situation as a reservist; placed involuntarily into the Individual Ready Reserves (IRR) without due process or recourse. While in the IRR, reservists are placed in a “no pay-no points” status, which will prevent me from accumulating points to earn a “good year.” The consequence of this action is that despite still being “in the military,” I would not be allowed to satisfy the requirements of military service despite remaining in the military beyond 20 years of service. In essence, the command would prevent me from earning a retirement despite the fact that I am mere months from retirement eligibility after 19 years of honorable service, not withstanding the four years served at the Air Force Academy beginning in 1999.

22. I performed my job duties with no interruptions and no harm to my job performance from March 2020, when COVID-19 mitigation measures were put into effect, until May of this year, when I was removed from attending a training exercise to San Antonio due to Air Force Reserve Command (AFRC) policy that prevents non-vaccinated members from performing any temporary duty (TDY). Prior to this, I successfully carried out my unit’s mission and at no time was there an impact to the mission as a result of COVID-19 to include a TDY to Savanna Georgia to support Presidential protection under Operation Noble Eagle (ONE). In fact, on December 6, 2021, Lieutenant Colonel David Snodgrass, USAF, Commander of the 457th Fighter Squadron, the squadron to which I am attached, submitted a memorandum to the Surgeon General of the Air Force in support of granting

a religious accommodation. In his memo, Lt Col Snodgrass affirmed that granting my RAR would have no impact on my ability to carry out my duties at home station. He also affirmed granting my RAR would have no impact on my ability to carry out my duties at a deployed location, unless a COVID-19 vaccination was mandatory for deployment. In that event he affirmed I would be just as vital to mission accomplishment by remaining at home station and training the second rotation pilots for deployment. He affirmed granting my RAR would not impact the squadron's ability to accomplish the wing mission of training and deploying combat ready airmen. He affirmed that due to the persistent shortage of fighter pilots, granting my RAR would improve the overall military readiness of the squadron while failing to do so would reduce overall squadron readiness and increase workload on the remaining pilots. He affirmed that granting my RAR would have no impact on unit cohesion or good order and discipline. He affirmed that the single-seat F-16 mission does not require close contact or sharing confined space with other personnel. He affirmed that means less restrictive than requiring the COVID-19 vaccination – wearing a mask, social distancing, and periodic testing – had been effective for the squadron for the preceding 19 months and could meet the government's interests. He repeatedly asserted that granting my RAR and allowing the squadron commander to manage how squadron personnel are employed would provide the best outcome for his squadron's readiness and ability to execute its mission. Thus far, my local command has remained amicable and supportive during this process.

23. Since March of 2020, my job duties included F-16 Instructor Pilot and 301FW Flight Safety Officer while stationed at Naval Air Station Joint Reserve Base Fort Worth, Texas.

24. After submitting my RAR on October 12, 2021, on December 1, 2021, I received the initial denial of my RAR.
25. The denial was issued by Lieutenant General Richard W. Scobee, USAF, Commander Air Force Reserve Command, and the reasons cited were risk to the mission, specifically the health, safety and readiness of the force which he claimed is the compelling government interest.
26. However, I was perplexed General Scobee cited those reasons when considering the March 1st DoD guidance which eliminates masking and other requirements for service members, federal civilian workers, and contractors, and also does not require vaccination status to be a factor in the workplace. These same federal civilian contractors, whose vaccine mandate is not presently in effect, are permitted to work in close proximity in our squadron on a daily basis. Thus, General Scobee considers the unvaccinated a threat to mission accomplishment yet part of that mission includes a large civilian workforce that are not vaccinated. For example, our squadron outsources our F-16 simulators to BGI LLC, a government contractor, with numerous employees in close proximity to military members. Other members of my unit are Air Reserve Technicians (ARTs) whose positions are tied to a military position; usually a Traditional Reservist (TR). As an ART, their status falls under the Federal Civilian Employee that holds dual status as a member of the Reserves. Thus, one position is tied to the other. Crew Chiefs, who are responsible for preparing the aircraft prior to each flight, are often ARTs. Several crew chiefs in my unit were placed on a “no pay no points” military status after being denied their own religious accommodation to vaccination, but are still performing their roles in a civilian

capacity; yet oddly, still required to wear the military uniform while doing so. They are currently barred from reenlistment, thus will lose their civilian jobs at the completion of their Federal Civilian Employee contract because their military position is being taken from them. It is a back-door way to circumvent the March 1st guidance.

27. On 7 December 2021, I submitted a Freedom of Information Act request for my package in anticipation of a denial.
28. On 7 March 2022, I received a highly redacted file that offered no insight into the deliberation process of my accommodation request.
29. On December 8, 2021, I submitted my appeal to the Air Force Surgeon General and am awaiting a final response.
30. Pursuant to Department of the Air Force Instruction 52-201, *Religious Freedom in the Department of the Air Force*, dated June 23, 2021, paragraph 2.10, I would expect to receive my appeal denial any day now, which means that administrative consequences will swiftly follow. That paragraph specifically states that “[a]ppeal of a disapproved religious accommodation request must be resolved no later than 30 business days following the member’s written notification of intent to appeal to the next higher decision authority in the chain of command.”
31. My civilian employment is as a pilot for American Airlines. I am a first officer flying the Airbus 320 domestically out of Dallas Fort Worth International Airport. Under the executive mandate issued by POTUS, I was directed to vaccinate by American Airlines, or risk termination. I submitted for and was granted an accommodation against vaccination utilizing the same arguments I presented in my RAR to the Air Force. The stipulations of

the approved accommodation ask that I simply assess my health prior to each flight, and if I am sick, to stay home, while additionally adhering to CDC social distancing and face mask guidance. Thankfully, regardless of my vaccination status, I am allowed to fly anywhere in the world that does not require a vaccine, which thus far has had zero impact on my domestic routes.

32. While I was mentally distraught over having to decide between my career to be able to provide for my family of four, or violating my sincerely held religious beliefs, I made the difficult decision to hold true to my faith and did not receive a COVID-19 vaccine. The emotional distress this decision is having on me and my family is overwhelming. I go to bed each night thinking my next flight will be my last, and that I then will be forced out of the military, losing my medical coverage and educational benefits for my children. The joy in our family has been replaced by frustration, stress, and confusion over how we have fought for a country that espouses religious freedoms, yet discriminates against those that are now fighting to protect it. I am told my lack of vaccination status is not conducive towards military service despite numerous studies stating that these vaccines do not prevent infection or transmission of COVID-19.

33. However, others who perform the same duties as me and who were granted medical exemptions to the COVID-19 Vaccine Mandate are still able to fly fighters for the Air Force. In fact, I have personal, first-hand knowledge that some of those individuals have been granted medical exemptions and can perform their job duties.

34. Without immediate relief, I am facing administrative consequences to include letters of council and letters of reprimand being placed into my permanent military file; being

forced into a “no pay, no points” status; and then being involuntarily forced into the Individual Ready Reserve (IRR) without ability to appeal, and eventually being administratively separated from the Air Force despite an honorable 19 year career when I could otherwise retire with honor after 20 years of service. I stand to lose both my military retirement due to not being able to earn a final “Good Year” and the educational benefits I transferred to my nearly four year old son. An injunction will allow me to accumulate enough points for my final “Good Year” and retire with honor. I currently plan to meet the requirements of a Good Year by the end of June 2022. If I am put into a “no pay no points” status prior to the end of June 2022, I will be ineligible for retirement, nor able to meet the obligations for transferring my education benefits to my children.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 26, 2022.

DocuSigned by:

Bryan Spence

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Bryan P. Spence

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BRYAN P. SPENCE, TYLER W. STEF,
RYAN CORCORAN, MITCHELL B. PIKE,
STEVEN R. HAYNES, ANDREW GRIEB,
DANIELLE A. RUNYAN, CHRISTOPHER M.
WU, and ALAN SOSEBEE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity
as United States Secretary of Defense,
THE UNITED STATES DEPARTMENT OF
DEFENSE, and FRANK KENDALL, in his official
capacity as United States Secretary of the Air Force,

Defendants.

Case No: 22-

DECLARATION OF LIEUTENANT COLONEL TYLER WILLIAM STEF

Pursuant to 28 U.S.C. §1746, I, Lieutenant Colonel Tyler William Stef, under penalty of perjury, declare as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I presently reside in Newark, Texas.
3. I have served in the Department of the Air Force (“Air Force”) as an active-duty service member since May 31, 2006.
4. Over the course of my career, I have received the following awards: The Air Education and Training Command Commander’s Trophy for being the top graduate in my pilot training class, the Air-to Air Weapon System Evaluation Program “Top Gun” Award for being the top performer in the exercise, the Academic Excellence Award from MQ-9A Training as the top academic graduate, multiple Company Grade Officer, Field Grade Officer, and Instructor Pilot of the Quarter awards, two Air Force Commendation Medals, and three Meritorious Service Medals.
5. I have also been a Distinguished Graduate in multiple programs throughout my career. I was a Distinguished Graduate from the United States Air Force Academy, Undergraduate Pilot Training, Introduction to Fighter Fundamentals, and RQ-170 Initial Qualification Training. I have also been considered a top performer throughout my career and been ranked #1 twelve times by my squadron and group leadership. I was competitively selected to be an inaugural Combat Air Force’s Fellow and most recently asked to command the Air Force’s premier Combat Training Squadron (“CTS”), the 414th CTS (RED FLAG), where I commanded a 72-member squadron responsible for training 17,100 United States, Joint, and Coalition personnel annually in the largest Department

of Defense live-fly air-air large-force-exercise. This position is normally filled by a senior Colonel and I accomplished the job as a new Lieutenant Colonel.

6. At no time during my career have I received any form of punishment or reprimand, other than the punishment I recently received related to the Air Force's COVID-19 vaccination requirement, which is explained in more detail below.
7. I am presently assigned to the 90th Flying Training Squadron at Sheppard Air Force Base ("Sheppard") in Wichita Falls, Texas. I have been assigned to Sheppard since October of 2021. I was previously assigned to Nellis Air Force Base ("Nellis") in Nevada from June 2017 to October 2021 where I last served as the Deputy Commander and then Commander of the 414th Combat Training Squadron.
8. From March of 2020 until October 2021, my job duties included commanding a 118-member military, civilian, and contractor team, leading multiple large-force exercises for 372 United States, Allied, and Coalition units, directing operational control and logistics support for 1,200 aircraft and 17,100 personnel annually while overseeing a \$23.5 million annual budget. My duty station was Nellis Air Force Base, Nevada.
9. As of October 2021, my job duties include assisting with squadron scheduling duties. However, my job duties would be instructing student pilots in the T-38C and a significant leadership role within the 80th Flying Training Wing if I was not removed from instructor pilot training.
10. Since COVID-19 mitigation measures were put into effect in March of 2020, there have been no interruptions to my job duties or my job performance. In fact, I successfully carried out my units' missions, and at no time was there an impact to the mission as a result of COVID-19. I was responsible for saving two RED FLAG exercises during the

time when COVID mitigation efforts were in effect by creating rule-sets that allowed world-class air-combat training to 3,100 service members

(<https://www.nellis.af.mil/News/Article-Display/Article/2721513/red-flag-21-3-uses-joint-training-to-enhance-interopability/>).

11. On August 24, 2021, the Secretary of Defense issued a mandate for all members of the Armed Forces under Department of Defense authority on active duty or in the Ready Reserve, including the National Guard, to immediately begin full vaccination against COVID-19.
12. On September 3, 2021, the Secretary of the Air Force issued a similar mandate (“COVID-19 Vaccine Mandate”) requiring commanders in the Air Force to take all steps necessary to ensure all uniformed Airmen and Guardians received the COVID-19 vaccine, which included issuing unit-wide and individual orders to their military members.
13. In response to the COVID-19 Vaccine Mandate, service members were permitted to submit a request for either a religious or medical exemption.
14. On September 8, 2021, my then-supervisor, the Commander of the 414th Combat Training Squadron at Nellis, issued me a verbal order during a phone call to receive the COVID-19 vaccine. At that time, I was the Deputy Commander of the 414th Combat Training Squadron.
15. During the call, I told my Commander that my intention was to seek a Religious Accommodation Request (“RAR”). My Commander stated that he would support and recommend approval of my RAR.

16. As a requirement of the Air Force's RAR process, on September 15, 2021, I was interviewed by the Nellis Deputy Wing Chaplain to discuss my sincerely held religious beliefs. Our conversation resulted in the chaplain affirming my sincerely held beliefs while supporting and recommending approval of my RAR. He also stated in the memorandum that memorialized my interview that "[a]ccommodation for immunization waivers have been made previously for currently serving members of the USAF and DoD."

17. That same day, I was counseled by my commander that noncompliance with immunization requirements may adversely affect deployment, assignment, international travel, or result in other administrative consequences. "Administrative consequences" include written counseling and administrative separation, which, if received, would detrimentally impact my career. Noncompliance could also result in nonjudicial punishment under Article 15 of the Uniform Code of Military Justice. This is where the commander offers to issue a service member punishment subject to the member's consent to be tried exclusively by the commander. As part of this process, the member could decide to turn down this offer and elect to be tried by court-martial.

18. However, on September 21, 2021, my commander issued a memorandum for all review authorities determining that there was not a compelling government interest to disapprove my RAR. He recommended approval of my request, stating that he took into account the fact that the Air Force has a compelling government interest in mission accomplishment and the effect my accommodation would have on readiness, unit cohesion, good order and discipline, health, and safety of the unit and myself, and the impact on my duties. He also stated that there were less restrictive means that can be used to meet the

government's compelling interest by mandating that I continue to practice social distancing and disciplined mask wear.

19. On September 20, 2021, as an additional requirement of the Air Force RAR process, I attended medical counseling at the 99th Medical Group at Nellis. The purpose of the counseling was to inform me of the dangers of COVID-19 if I were to remain unvaccinated and the benefits of receiving the COVID-19 vaccine.
20. On September 22, 2021, I submitted my RAR requesting to be exempted from the COVID-19 vaccine requirement. However, as I explain below, I later found out that my RAR was never processed while I was assigned to Nellis.
21. While my RAR was pending, on or about October 1, 2021, I traveled on official orders to my now-duty station at Sheppard.
22. On October 5, 2021, I arrived at Sheppard, and on October 6, 2021, I went on temporary duty orders to Wright-Paterson Air Force Base in Ohio for training purposes. I traveled back to Sheppard during the evening hours of October 7, 2021.
23. On October 8, 2021, I began Pilot Instructor Training ("PIT") at Sheppard. The purpose of me being assigned to Sheppard was so I could become qualified as an instructor pilot and train student pilots on the T-38C.
24. On October 18, 2021, while still in training, my commander, 90th Flying Training Squadron, reached out to me via text message asking what my vaccination status was. I immediately returned his call and told him that I had submitted a RAR at Nellis in September of 2021 and that I was not vaccinated. My commander's response was that I could continue training at that time.

25. On October 20, 2021, my commander asked me to meet with him in his office. He immediately removed me from PIT and placed me on “Admin Hold”¹ because of an August 31, 2021, 19th Air Force Commander policy stating that any officer in a formal flying course will be placed on Admin Hold because of their unvaccinated status while seeking an exemption. I was removed from PIT despite the fact that all certified instructor pilots who work and instruct in the same spaces and around the same personnel as PIT students like myself at Sheppard who were seeking RARs at that time were allowed to keep performing their duties without being placed on “Admin Hold.”
26. On October 27, 2021, I filed an Equal Opportunity complaint against the 19th Air Force Commander on the basis that his August 31, 2021, policy was discriminatory and in direct violation of Department of the Air Force Instruction 52-201, para. 1.3, Department of Defense Instruction 1300.17, para. 1.2b, and Air Force Policy Directive 52-2, para. 1.6. My Equal Opportunity complaint argues that my removal from training is a clear case of religious discrimination as I am either being ordered to violate the tenants of my religious faith or face punitive action and denial of training that I had been scheduled to attend for over two years. Instead, I was assigned to other tasks such as assisting the squadron front office and scheduling duties, which are normally reserved for a Lieutenant, rather than attend required upgrade training for my job as an assigned T-38C instructor pilot.
27. In the meantime, on October 26, 2021, I received the results of my COVID-19 antibody test, which substantiated that I had overwhelming antibodies to the COVID-19 virus.

¹ Admin Hold is a policy commanders can use to pause students in their training for purposes other than medical needs or performance below minimums. This is typically used when students are dealing with major life events that would detract from training or other similar situations.

28. On November 1, 2021, I received a phone call from my commander letting me know that my major command, Air Education Training Command (“AETC”), was requesting to take over my RAR processing from my prior major command, Air Combat Command (“ACC”).²
29. On November 2, 2021, I submitted all of my original RAR documents to my 90th Flight Training Squadron commander.
30. On or about November 7, 2021, I updated my RAR to include a memo requesting that I be exempt from all vaccines and medicines produced or developed using /or containing fetal cell lines or mRNA technology.
31. In my RAR, I explained that I am a devout Christ follower who believes in the sanctity of human life from the point of conception. Any attempt to end that life equates to murder, in my mind. I cannot be a part of any process that utilizes or creates benefit from murdering a baby. Each life is created in God’s image. Further, I explained that utilizing mRNA technology in vaccines usurps God’s creation of the human genome.
32. On November 29, 2021, my commander informed me that the Religious Resolution Team (“RRT”) completed their review of my RAR. But the next day, my commander called me to confirm which RAR I wanted to submit (either my original RAR regarding only the COVID-19 vaccine or the updated version where I requested an exemption to all vaccines). I informed him that I was seeking the exemption to all vaccines to fetal cell lines or mRNA technology, which prompted the need for me to reaccomplish my medical counseling and chaplain interview.

² My unit at Sheppard falls under AETC, and my prior unit at Nellis falls under ACC.

33. On December 2, 2021, I completed my medical counseling over the phone with Sheppard Flight Medicine. I was counseled on the risks, benefits, and alternatives of receiving or declining vaccinations that utilize genomic technologies or incorporate fetal cell matter for vaccine development or manufacture. I was later advised that I did not need to complete another chaplain interview.
34. December 6, 2021, was the first day of required COVID-19 testing for unvaccinated Airmen. All of the unvaccinated were required to meet in the Operations Group auditorium for testing each week. I have tested negative for COVID-19 every week through May 16, 2022, which was my most recent test date.
35. During the 2021 Christmas break, I learned that the Centers for Disease Control (“CDC”) guidance stated that if you have allergies to ingredients in the COVID-19 vaccine, you should not get the vaccine.³ This information was significant because in my family, my wife and some of my children have significant allergies and autoimmune diseases. Specifically, my wife and some of my children have Celiac disease, and we have known allergies to gluten and dairy. My children also have sensitivities to mold, heavy metals, and many other substances. One of my daughters, had a severe allergic reaction to a vaccine when she was two years old. Her entire body broke out in a rash, she vomited profusely, and had trouble breathing. Given these unique circumstances, we have spent the last 11 years seeking answers and healing for our family. This journey led us to functional medicine which seeks whole body solutions and healing rather than just treating symptoms. It has solidified our belief in a medical model to promote, seek, and maintain optimal wellness. Due to these concerns, my spouse and children are not

³ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/specific-groups/allergies.html>

vaccinated. One of my other daughters was recently hospitalized in April 2021. My mother was vaccinated four days prior to visiting us for a few days. On the second day of her visit, my daughter became very lethargic and within 48 hours had broken into a whole-body rash, her eyes became completely bloodshot, she had a high fever, and her resting heartrate was in the 160s. We rushed her to the emergency room where she was immediately admitted to the ICU. She was hospitalized for seven days and was diagnosed with Multi-System Inflammatory Syndrome in Children (MIS-C) as a result of being around my vaccinated mother, according to the attending physician. We had two other doctors confirm this link to her disease. She now has to be seen by a cardiologist for the rest of her life due to damage to her heart. I was, and still am, sincerely concerned for the health of myself and my family due to shared genetics and the link to the vaccine.

36. Considering my family's long history with vaccine-related issues, a close friend informed me that it was possible to test for allergies to the specific components of the COVID vaccine to find out if there would be an adverse reaction. I was relieved, because there was finally a valid avenue in place to address my and my family's medical concerns.

37. Based on my friend's recommendation, I decided to see Dr. Alfred Johnson, D.O., who was a doctor other service members had used for allergy testing. On Dr. Johnson's website, a few of his credentials are stated as follows: "A fellow, former board member, and Instructional Course Director of the American Academy of Environmental Medicine, Dr. Johnson is also a member of the American college of Osteopathic Internists, the Joint Council of Allergy and Immunology, Pan American Allergy Society (and a former board member), the American Osteopathic Association and the Texas Osteopathic Association,

in which he formerly served as vice president of the Dallas chapter.”

[\(https://www.johnsonmedicalassociates.com/about-dr-johnson/\)](https://www.johnsonmedicalassociates.com/about-dr-johnson/)

38. On January 12, 2022, I met Dr. Johnson and had testing done.
39. On January 14, 2022, I received a letter from Dr. Johnson showing that I tested positive for having a reaction to polyethylene and polysorbate, which are ingredients in the COVID-19 vaccines.
40. On January 18, 2022, I visited with my squadron’s assigned flight surgeon to complete my annual physical. During the visit, I showed the doctor my allergy test results and receive a 365-day temporary medical exemption. He told me that the exemption was in accordance with Air Force and Sheppard procedures and that he could create the exemption.
41. On January 19, 2022, I let my commander know that I had an approved medical exemption and that I would like to start training on February 8, 2022, the start of the next PIT class.
42. On February 7, 2022, when I arrived at work, I checked my Individual Medical Readiness status. It stated that I was grounded from flying with no explanation. I immediately went to my commander who said he was unaware of this development and that I should still expect to start training the following day.
43. Later that day, my commander called me and advised that I was removed from training and that I was back on “Admin Hold.” I was told to continue my telework schedule. The catalyst for this grounding and removing me from training again was directly related to my submission of allergy testing and subsequent temporary medical exemption.

44. On February 9, 2022, my commander issued me my initial denial of my RAR. I did not sign it but acknowledged that I had five days to appeal. I then sent my commander an email request for Privacy Act documents related to my RAR denial and asked for an extension of time to file my appeal until I had all the documents related to my denial. The commander denied that request.

45. The initial denial of my appeal was issued by Lieutenant General Marshall Webb, AETC Commander, and the reasons cited were that, although my beliefs are sincere, the Air Force's compelling government interest outweighs my individual beliefs and that there are no lesser means to satisfy the government's interests. Additionally, he stated that an exemption would undermine my authority and credibility as an officer, detracting from good order and discipline.

46. However, Lieutenant General Webb did not state that any consideration was given to the fact that the extreme measures needed to combat COVID-19 by AETC during its early stages were no longer required (i.e. maximum telework was no longer directed or required, occupancy limitations were no longer in effect, I have zero need to interact with Basic Military Training personnel, and I will never have to attend Professional Military Education again to successfully serve through retirement). Further, he did not consider my ability to socially distance within the 90th Flying Training Squadron and successfully complete my duties (my current duties include working in the same spaces and interacting with the same personnel that I would be if I was accomplishing duties as an instructor pilot), he did not consider that there are zero stateside restrictions that would impact my ability to go on temporary duty, he did not consider the fact that I am not deployable as a PIT trainee or that I could opt-out of future deployments, he did not

consider my natural immunity, he did not consider that “herd immunity” has been created in the 90th Flying Training Squadron with a 95.5% vaccination rate, and he did not consider my offer to continue to test weekly as a lesser restrictive means through retirement.

47. That same day, February 9, 2022, I was advised that I needed to meet with my commander the next day. When we met, I was issued formal notice that I was under a Commander Directed Investigation (“CDI”). The reasons for the CDI were that it was alleged I, with the intent to deceive, made a false official statement, to wit: proffering a doctor’s memorandum reflecting an allergy to polyethylene glycol and polysorbate, which record was totally false, and then known by me to be false and that I feigned an allergy to the COVID-19 vaccine for the purpose of avoiding the mandatory COVID-19 vaccine.
48. At no time did I proffer a false doctor’s memo and at no time did I feign an allergy to the COVID-19 vaccine for the purpose of avoiding the mandatory COVID-19 vaccine. Dr. Johnson has provided other service members with allergy testing that established the basis for such members’ presently valid medical exemptions. For Reservists, the testing has been paid for by the DoD’s TriCare Reserve Select insurance.
49. On February 11, 2022, my commander told me that once I appealed my RAR, I would no longer be eligible for a retirement option when the appeal is denied.
50. On February 14, 2022, I submitted my appeal to the Air Force Surgeon General.
51. On or about that same day, I met with the Investigating Officer for the CDI and gave a short statement regarding my visit with the allergy doctor.

52. From February 15 until February 22, 2022, while on leave in Las Vegas to visit my wife and kids who had not yet moved to Texas, I met with a different allergy, asthma, and immunology doctor, Dr. Matt Morgan, who was a board-certified allergist, for a second opinion on Dr. Johnson's allergy test. These confirmatory test results again reflected that I tested positive for a reaction to polyethylene and polysorbate.
53. On March 21, 2022, my appeal to the Air Force Surgeon General was denied. It was clear that the March 1 DoD guidance that eliminates masking and other requirements for service members, federal civilian workers, and contractors and also does not require vaccination status to be a factor in the workplace was not considered as part of the Surgeon General's decision. Also, federal civilian worker and federal civilian contractor vaccination mandates were not and are still not presently in effect, and those individuals are permitted to work in close proximity with the vaccinated on a daily basis. I know of one unvaccinated federal employee who I worked with daily during my time at Nellis who continues to work in close proximity to active-duty Air Force officers and pilots.
54. After receiving my appeal denial, I was given five days to get a COVID-19 vaccine or face disciplinary action.
55. The reasons cited for the denial were that the government had a compelling government interest to vaccinate me and that there were no lesser restrictive means to accommodate my request, specifically teleworking or maintaining adequate social distancing.
56. On March 23, 2022, I had a phone interview with an Air Force allergist to determine whether I had an allergy to the COVID-19 vaccines. I told him about the confirmatory test results from Dr. Morgan, and he asked me to submit those as part of my Air Force medical records. I did so on or about March 28, 2022.

57. On March 28, 2022, I was given the results of the CDI, which were heavily redacted. The results stated that I submitted a false official statement by submitting my record of testing from Dr. Alfred Johnson, D.O.; attempted to disobey a lawful order to receive the mandatory COVID-19 vaccine; and committed an overt act by negligently feigning an allergy to components of the COVID-19 vaccine without proper medical testing or approval. I was given two weeks to respond to the findings, so I worked with my Area Defense Counsel (“ADC”) and delivered a response on April 11, 2022. My response reiterated my Christian beliefs, summarized my family’s diverse medical history, explained my medical concerns and potential link to my daughter’s MIS-C diagnosis, my experience being made aware of CDC guidance about allergies to components of the COVID-19 vaccines, and my experience and trust in Dr. Johnson’s allergy testing. At no point did I ever intend to deceive, nor did I deceive, nor did I make a statement that I knew to be false. Acknowledging my family’s history of allergies, vaccine reactions, and history of autoimmune issues (specifically in my children), I sought out medical advice from an allergist so that I could be tested for the components of the COVID vaccine. I never once tried to hide the fact that I was trying to see if I was allergic to the COVID vaccine.

58. Additionally, the findings of the CDI determined that Dr. Alfred Johnson was not deemed a legitimate doctor by the Air Force. There was and is no evidence of this based on my own research. He is a doctor of internal medicine who received over a 4.0/5 rating online, he has a legitimate website, he is licensed to practice in three states, and he sat on the Texas State Medical Board. There was no reason for me to believe that Dr. Johnson’s testing was fraudulent or not reliable, and before going to his office, I had no idea what

my test results were going to be. Had they turned out negative, it would have alleviated the grave concern I had for my and my family's health. When the test results came back positive, I had no reason to disbelieve the test results and every reason to trust the test results, particularly since other service members have active medical exemptions based on Dr. Johnson's testing. I submitted the test results to my flight doctor, he accepted the results, and I received a medical exemption from taking the COVID vaccine. At every single step in these processes, I was always taking the legal methods and avenues that were available to me.

59. On April 7, 2022, a doctor at the San Antonio Military Medical Treatment Facility called me and let me know he reviewed Dr. Morgan's testing and results. He confirmed that everything was accomplished according to standard allergist care. We collectively decided that I should do in-person allergy testing at that military medical facility. An appointment was then made for May 12 and 13, 2022 for confirmatory allergy testing.
60. On May 2, 2022, I was given a Letter of Admonishment ("LOA") from my wing commander for attempting to disobey a direct order because I went to an out of network doctor (Dr. Johnson) who was deemed illegitimate by the Air Force and for seeking a medical exemption in January 2022 rather than September 2021. Specifically, my wing commander determined that my submission of the allergy test results from Dr. Johnson was an attempt to disobey the direct order to receive the COVID-19 vaccine.
61. On May 9, 2022, my ADC submitted my LOA response to my wing commander.
62. On May 11, 2022, I traveled to the San Antonio military facility for my third allergy test. While I had responses to polyethylene, the allergist there determined that I was not allergic and the recommendation was that I return the following day for a quick follow up

to receive the Pfizer vaccine with a 4-hour observation period post vaccine administration.

63. On May 13, 2022, I declined the Pfizer vaccine and, at that point under significant duress, let the San Antonio allergist know that I would consider the Johnson and Johnson vaccine. Due to the military allergist witnessing my vasovagal syncope (a sudden drop in heart rate and blood pressure leading to fainting) during skin testing, he stated that I should find an allergist to administer the shot or a flight medicine doctor or clinic that is familiar with allergies and vasovagal syncope. I am advised to not go to a pharmacy to receive a COVID-19 shot.
64. That same day, my ADC asked me to get a Memorandum for Record from the San Antonio military allergist memorializing that my visit with him was appropriate, given the results of my prior allergy test. The military allergist stated that his notes in my medical records would be a more appropriate source document legitimizing my visit to the San Antonio clinic.
65. On May 14, 2022, the pressure to get vaccinated continued to mount, and the stress was becoming unbearable. I informed my commander about the results of the San Antonio allergy test and that I was seriously considering getting the Johnson and Johnson shot. I informed him that the San Antonio allergist recommended that I receive the vaccine only from an allergist or doctor familiar with allergic reactions. However, I was unable to find a local allergist or clinic that would observe me and had the Johnson and Johnson vaccine available.
66. I informed my commander that I was unable to find an allergist to administer the Johnson and Johnson vaccine and he recommended that I just get the vaccine at a pharmacy and

then drive to an allergist to be observed or hire an allergist to accompany me to the pharmacy. I looked through the CDC vaccine finder website for clinics that had experience with allergies and had the appropriate vaccine, I called the Sheppard Immunizations Clinic to see if they had the Johnson and Johnson vaccine, I called the local health district, and I called pharmacies that had the Johnson and Johnson vaccine to ask if they would sell me a vial of the Johnson and Johnson vaccine so I could bring it to an allergist, clinic, or my MTF for administration of the vaccination and subsequent observation, all to no avail.

67. On my drive home from work that day, my commander called me and suggested that I should be careful where I get the vaccine and that the establishment should be “above reproach,” like a CVS or Walgreens. He stated that he had conversations with some folks and that I needed to be careful on where I got the vaccine (so that the establishment would not be questioned). This advice on going to a pharmacy like CVS or Walgreens was completely contrary to the San Antonio allergist’s recommendations.
68. At this point, I felt hopeless and like I had zero options left and that I had no choice but to violate my sincerely held religious beliefs and receive the vaccine. I felt it was the only way I could keep my job and continue to provide for my family and to be able to support them in the future. I immediately started praying for forgiveness and for protection for both myself and my family.
69. On May 17, 2022, my ADC sent my wing commander the San Antonio allergist’s notes confirming that I had a valid reason for the visit and the follow-up allergy testing. My ADC then informed me that the wing commander was planning on upholding my LOA

and that the Staff Judge Advocate (the wing commander's legal advisor) stated that "it wouldn't hurt" my chances of the LOA being rescinded if I were to receive the vaccine.

70. I then received multiple texts and a call from my commander asking if I got the vaccine.

I told him that I had until close of business on May 18, 2022, to receive it, but he told me I must get it first thing in the morning on May 18 to not jeopardize the 5-day timeline. I was still very troubled by having to violate my sincerely held beliefs and the added pressure of having to get the vaccine the following morning was overwhelming.

71. On May 19, 2022, my commander sent me a text message asking me if there are any vaccines available overseas that meet my religious concerns. I was not aware of any of the top of my head, but told him I would look into the World Health Organization approved vaccine lists. I found one vaccine, COVAXIN, available in India, that (based on limited research) looked as though it might meet my religious concerns and communicated that to my commander via text message. He did not respond.

72. On May 23, 2022, my commander issued me a Letter of Counseling ("LOC") stating that I am expected to comply with the order directing me to get the COVID-19 vaccine now that my appeal has been denied, that my unwillingness to follow orders is an act of insubordination, and that any future misconduct may result in more severe action to include administrative actions and involuntary separation, which I can be subject to at any given moment from this day forward. In fact, I suspect that involuntary separation will be the next step my commander will take since he has punished a fellow airman in this manner for also refusing the COVID-19 vaccine. During the meeting with my commander while receiving the LOC, he asked if I had thought about the overseas vaccine option. I told him that I did not know what he meant by that statement because he

had only asked me if there were any available overseas that met my religious requirements. He asked if I knew a certain captain in the 80th Flying Training Wing. I did not, but my commander told me to look him up and call him as soon as possible. My commander then stated that I must make the decision about the overseas vaccine option without delay. I clarified that if I chose to travel for a vaccine, that it would be self-funded, and he affirmed. After the LOC issuance, I made a few phone calls to people I work with on base to inquire about this captain. I learned that his commander offered and granted him Permissive Temporary Duty (where the member does not need to take time off, but the government does not fund the trip) to travel to India to receive the COVAXIN vaccine. He is now deemed in compliance with the vaccine mandate.

73. Having a LOA and LOC on my record has already significantly impacted my ability to attend future professional military education opportunities and my opportunity to promote to Colonel, thereby depriving the Air Force of a leader with impeccable character and demonstrated leadership ability.
74. While I have been mentally distraught over having to decide between my career, being able to provide for my family of eight on only my income, and violating my sincerely held religious beliefs, I have made the difficult decision to hold true to my faith and not receive a COVID-19 vaccine. My family has been under unimaginable stress and mental anguish throughout this entire process. I have had to constantly defend my faith, while still working in an environment and around the same people (all-the-while remaining healthy and free of COVID-19). Further, I had to defend my integrity and credibility as a Christian, officer, father, husband, and human being for seeking a legal process to validate my immense medical concerns for myself and family. Every single day is filled

with stress due to the unpredictable and punitive nature of seeking a religious and medical accommodation from the COVID-19 vaccine while trying to figure out and manage my family's future.

75. Further, I have been grounded and unable to fly or complete my instructor training since October 2021. I cannot get flight hours necessary for me to seek employment with the airlines should I be administratively separated from the Air Force. I will not receive a paycheck should I be kicked out (we are a single income family that relies on my income to survive – my wife is a stay-at-home mom who homeschools our six children) and will not have access to other benefits, such as healthcare. I will be unable to complete my remaining 4 years of service and receive retirement income should I be kicked out—this equates to about \$3 million in income should I live until the normal life expectancy in the United States. Should I receive anything other than an honorable discharge, I will lose the GI bill that I transferred to my daughter. Additionally, I am eligible for retention bonuses this year that would equate to between \$105K and \$140K given I serve through 20 years of service; I will be unable to receive this should I be kicked out.
76. Without immediate relief, I am facing further adverse administrative actions, and the imminent likelihood of involuntary separation. These actions will undoubtedly put an end to my career, will have a significant impact on my ability to send my 18-year-old daughter to college later this year, and will eliminate any chance of seeking retention bonuses or a retirement income. Should a bad conduct code be added to my DD214 upon separation, as is happening across the DOD, it would affect my ability to garner any meaningful employment outside of the military. Only immediate injunctive relief at this point can stop the progression of these real harms from happening.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on May 26, 2022.


Tyler William Stef

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BRYAN P. SPENCE, TYLER W. STEF,
RYAN CORCORAN, MITCHELL B. PIKE,
STEVEN R. HAYNES, ANDREW GRIEB,
DANIELLE A. RUNYAN, CHRISTOPHER M.
WU, and ALAN SOSEBEE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity
as United States Secretary of Defense,
THE UNITED STATES DEPARTMENT OF
DEFENSE, and FRANK KENDALL, in his official
capacity as United States Secretary of the Air Force,

Defendants.

Case No: 22-

DECLARATION OF MAJOR RYAN CORCORAN

Pursuant to 28 U.S.C. §1746, I, Major Ryan Corcoran, under penalty of perjury, declare as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I presently reside in Montgomery, Texas.
3. I have served with the Department of the Air Force (“Air Force”) since December 20, 2002.
4. Over the course of my career, I have received many awards including two Meritorious Service Medals, an Air and Space Achievement Medal, an Afghanistan Campaign Medal, and an Iraq Campaign Medal.
5. I am presently assigned to Headquarters, United States Air Forces in Europe / Air Forces in Africa at Ramstein Air Force Base where my job title is Individual Mobilization Augmentee to the Deputy Chief Regional Analysis Branch. I have been assigned to that office since November 1, 2015.
6. On August 24, 2021, the Secretary of Defense issued a mandate for all members of the Armed Forces under Department of Defense authority on active duty or in the Ready Reserve, including the National Guard, to immediately begin full vaccination against COVID-19.
7. On September 3, 2021, the Secretary of the Air Force issued a similar mandate (“COVID-19 Vaccine Mandate”) requiring that commanders in the Air Force take all steps necessary to ensure all uniformed Airmen and Guardians received the COVID-19 vaccine, which included issuing unit-wide and individual orders to their military members.

8. On October 7, 2021, my commander issued me an order to receive the COVID-19 vaccine.
9. In response to the COVID-19 Vaccine Mandate, service members were permitted to submit a request for either a religious or medical exemption.
10. On October 24, 2021, I submitted a Religious Accommodation Request (“RAR”) to be exempted from the COVID-19 vaccine requirement.
11. In my RAR, I explained my sincerely held religious objection to receiving medication that was developed with the aid of aborted fetal cells. I also explained my sincere belief that my body is a temple unto the Lord, and that I should refrain from injecting substances into it that might compromise my body.
12. As a requirement of the RAR process, on November 8, 2021, I was interviewed by the Ramstein Air Force Base chaplain regarding my sincerely held religious beliefs.
13. On November 8, 2021, the chaplain determined that my religious beliefs were sincere and that my beliefs would be substantially burdened if I was required to take a COVID-19 vaccine. The chaplain report noted that my broader theological convictions are consistent with my system of belief. He went on to underscore my position that, if there were not a “morally dubious” vaccine, I would be open to receiving the vaccine.
14. As an additional requirement of the RAR process, on November 5, 2021, I was counseled by Philip Oro, MD of the 86th Medical Group about the risks of not being vaccinated and becoming ill with COVID-19.
15. On October 29, 2021, I was counseled by my commander that noncompliance with immunization requirements may adversely affect readiness for deployment, assignment, international travel, or result in other administrative consequences. “Administrative

consequences” include non-judicial punishment, which, if received, would detrimentally impact my career and retirement benefits which I have earned.

16. On December 7, 2021 I received a memo from my commander listing alternative vaccines which are WHO-approved, not FDA-approved and which do not carry Emergency Use Authorization. This memo inquired as to my willingness or unwillingness to accept any of these alternatives to those available in the United States. As was within my rights, I declined to make what I saw as a commitment to take a foreign alternative which I knew nothing about. Furthermore, as a career civilian pilot, the Federal Aviation Administration (FAA) makes mention only of the three Covid-19 shots available in the US and does not appear to have reviewed those foreign alternative vaccines. By taking one, I may be putting my FAA Medical Certificate in jeopardy.
17. Furthermore, it is contradictory that the Air Force is willing to subject me to a foreign product which has not been tested and approved by the US government, while at the same time discounting the natural immunity to Covid-19 which I have attained after having recovered from the illness in January of 2022, and for which I can provide documentation.
18. On December 12, 2021 I sent my commander an addendum letter to General Harrigian in which I further detailed the traumatic memories my family and I had been forced to relive by the Air Force’s process for Religious Accommodation. In that memo I further offered a way forward, namely to perform my duties one last time from Kelly Air Force Base in San Antonio, TX and then to retire on January 1, 2023.
19. As explained more fully below, I am at the end of a 20-year career with the Air Force—my anniversary is December 20, 2022. Receipt of an administrative action is a terrible

way of ending my career a mere several months before the end. It would taint my spotless service record, which is something that no amount of money can rectify.

Additionally, I believe that, in accordance with a December 7, 2021, memorandum from the Secretary of the Air Force, my command is refusing to act on my application for retirement, which is set for January 1, 2023, until I receive the vaccine.

20. Since COVID-19 mitigation measures were put into effect in March of 2020, there have been no interruptions to my job duties or my job performance. In fact, I successfully carried out my unit's mission on a mostly remote basis and at no time was there an impact to the mission as a result of COVID-19.
21. From March of 2020 until most recently, my job duties included classified intelligence review and providing analysis to my command. My assigned duty station has remained Ramstein Air Force Base and I have performed my duties remotely from Kelly Air Force Base in San Antonio Texas in order to support my unit of assignment's mission.
22. After submitting my RAR on October 24, 2021, on March 2, 2022, I received the initial denial of my RAR.
23. The denial was issued by Gen. Jeffrey Harrigian and the reasons cited were that my remote working solution was not a "long-term solution" and that my refusal to obtain a vaccine would place Department of Defense ("DoD") personnel at risk.
24. However, Gen. Harrigian's decision did not state that any consideration was given to my addendum memorandum dated December 12, 2021. In that memorandum, I detail, at length, the trauma my family faced due to loss of pregnancy and how abortion personally affects deeply held religious conviction. The decision also did not consider and the March 1, 2022, DoD guidance that eliminates masking and other requirements for service

members, federal civilian workers, and contractors and also does not require vaccination status to be a factor in the workplace. Also, the federal civilian worker and federal civilian contractor vaccination mandates are not presently in effect and that those individuals are permitted to work in close proximity with me on a regular basis in the physical contexts referenced by Gen. Harrigian's decision. Furthermore, as stated above, I am able to provide documentation of Covid-19 Antibodies due to having had Covid-19 in January 2022.

25. On March 8, 2022, I submitted my appeal to the DAF Surgeon General.
26. On April 10, 2022, my appeal was denied, and I was advised of its denial on April 22, 2022. I was then ordered to begin the Covid-19 vaccine regimen within one week or submit for voluntary separation from the Air Force. I was further advised that per Secretary of the Air Force guidance, if a member chooses to retire, that member must retire no later than the first day of the fifth month following their final denial of a religious accommodation. Therefore, since my request for retirement falls outside of this timeline, I am ineligible to retire and must either take the vaccine in violation of my sincerely held religious beliefs or request voluntary separation rather than retirement.
27. The reasons cited for the denial were that my non-vaccinated status would prevent the Air Force from effectively leveraging me and that remote work would not be an acceptable solution.
28. On April 29, 2022, I submitted a request for reconsideration as my circumstances had changed. After I submitted my exemption requests, and before I received my final denial, I completed my full-service requirement to satisfy a "good year" per the Air Force Reserve and I have a pending retirement application. The practical consequence of this is

that I have alleviated all of the concerns outlined in the initial denial of my exemption requests: 1) I have already completed my retirement requirements, and 2) I have already completed my last day in uniform. I now simply require an accommodation to reach my 20th year of service on December 20, 2022, and retire on January 1, 2023.

29. This process has caused me to be immensely mentally and emotionally distraught. As outlined in my addendum to my initial application, this ordeal has forced me to relive painful memories from my early childhood. By being forced to choose between my career and the vaccine, I am being forced to relive these memories for which no amount of money can make me whole.
30. My commander has indicated to me that the Air Force will process a Letter of Reprimand against me and that it will be delivered to my file soon, which means I could receive it today. This could have a detrimental effect to both my career and retirement.
31. Without immediate relief, I am facing irreparable harms. Receiving administrative action (Letter of Reprimand) in contravention of my constitutional rights is not something that can be rectified later with money. If I were to receive the vaccine to stop the Letter of Reprimand from hitting my file, then I have taken an action that cannot be undone, and it would have been a functionally-compelled action in violation of my sincerely held religious belief. In addition, reliving, and continuing to relive the trauma of my childhood due to this ordeal is not something that can be rectified later or rectified with funds.
32. In fact, I have already faced the harms that come from extreme mental and emotional anguish, and the burden of having to choose between saving a distinguished twenty-year

military career or violating my sincerely held religious belief. No service member should have to be in this position.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 24, 2022.



Ryan Corcoran

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BRYAN P. SPENCE, TYLER W. STEF,
RYAN CORCORAN, MITCHELL B. PIKE,
STEVEN R. HAYNES, ANDREW GRIEB,
DANIELLE A. RUNYAN, CHRISTOPHER M.
WU, and ALAN SOSEBEE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity
as United States Secretary of Defense,
THE UNITED STATES DEPARTMENT OF
DEFENSE, and FRANK KENDALL, in his official
capacity as United States Secretary of the Air Force,

Defendants.

Case No: 22-

DECLARATION OF MAJOR STEVEN RANDALL HAYNES

Pursuant to 28 U.S.C. §1746, I, Major Steven Randall Haynes, under penalty of perjury, declare as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I presently reside in Oklahoma.
3. I will have served 16 years as a Department of the Air Force (“Air Force”) Officer as of May 31, 2022, while currently serving as an Active Guard Reserve member.
4. Over the course of my career, I have received the following awards: Squadron Field Grade Officer of the Year (2017), Squadron Field Grade Officer of the Quarter x4, Squadron Pilot of the Year 2015 and Reservist of the Quarter.
5. At no time during my career have I received any form of punishment or reprimand, other than the punishment I received as a result of the Air Force’s COVID-19 vaccination requirement, which is explained in more detail below.
6. I am presently assigned to 5th Flying Training Squadron at Vance Air Force Base in Enid, Oklahoma, where my job title is Assistant Flight Commander/Instructor Pilot. I have been assigned to that unit since April of 2019.
7. On August 24, 2021, the Secretary of Defense issued a mandate for all members of the Armed Forces under Department of Defense authority on active duty or in the Ready Reserve, including the National Guard, to immediately begin full vaccination against COVID-19.
8. On September 3, 2021, the Secretary of the Air Force issued a similar mandate (“COVID-19 Vaccine Mandate”) requiring that commanders in the Air Force take all steps necessary to ensure all uniformed Airmen and Guardians received the COVID-19 vaccine, which included issuing unit-wide and individual orders to their military members.

9. On September 24, 2021, my commander issued me an order to receive the COVID-19 vaccine.
10. In response to the COVID-19 Vaccine Mandate, service members were permitted to submit a request for either a religious or medical exemption.
11. On October 12, 2021, I submitted a Religious Accommodation Request (“RAR”) to be exempted from the COVID-19 vaccine requirement.
12. In my RAR, I explained that my religious beliefs include eating clean meat in accordance with Leviticus 11, keeping the commandments of God per 1 Corinthians 7:19 and Revelation 14:12, and the sanctity of human life. Other applicable beliefs I referenced included, “Be Holy because I am Holy” from Leviticus 11:44 and 1 Peter 1:15-16 which relates to not eating unclean animals, keeping the Sabbath and loving our brothers and avoiding sorcery among other things. I explained 2 Corinthians 6:17 says, “Come out from them be separate, says the Lord. Touch no unclean thing, and I will receive you...let us purify ourselves from everything that contaminates body and spirit, perfecting holiness out of reverence for God.” I explained I believe that our “bodies are the Temples of the Holy Spirit (1 Corinthians 6:19)” and we are directed to “be Holy because I [the Lord] am Holy” (1 Peter 1:16) which draws from Leviticus 11:44 (clean and unclean foods), Leviticus 19:2 (keeping the Sabbath and various rules towards loving your brother as yourself), Leviticus 20:7 (judgment towards persons that seek mediums and spiritists). I explained I believe we are “fearfully and wonderfully made (Psalm 139:14)” in “the image of God (Genesis 9:6)” and our bodies are “temples of the Holy Spirit (1 Corinthians 6:19).” Thus, we should not do harm to our bodies and souls by intentionally ingesting or injecting unclean foods/animal cells, aborted fetal cells, gelatins from pigs or other unclean animal cells, or known toxins among other things. I explained it is my

belief that the COVID-19 vaccines contain some or all of these unclean things, and it is my belief that receiving the COVID-19 vaccines would be unholy and desecrate my body as a temple of the Holy Spirit.

13. In my RAR I explained that on the morning of September 6, 2020, while I was in Colorado hunting with my father, I was startled awake from a dream. I began praying and the interpretation of the dream from the Holy Spirit was, "They are going to force unclean things on you." Dreams are consistent with my faith as Joel 2:28 states, "it will come to pass that I will pour out My Spirit on all mankind; and your sons and daughters will prophesy, your old men will dream dreams, your young men will see visions." I explained I believe that this dream and its interpretation applies to the COVID-19 vaccinations and is a command from God that I am not to receive the vaccinations.
14. In my RAR, I explained that I believe that injecting unnatural substances such as (4-hydroxybutyl)azanediyl)bis(hexane-6,1-diyl)bis(2-hexyldecanoate), as well as a man-made mRNA coded particle have both negative spiritual and physical implications. The spiritual consequences, while not visible, are significant and can manifest into our physical lives. I explained I believe violating the guidance of the Holy Spirit by receiving the COVID-19 vaccines would be to separate myself from the Lord's will and walk in violation of His will for my life. This is important because Jesus warns us that, "Not everyone who says to Me, 'Lord, Lord,' will enter the kingdom of heaven, but he who does the will of My Father who is in heaven will enter (Matthew 7:21)." Thus, if I do not do the Father's will, I may be excluded from the promise. I explained this spiritual act of disobedience manifests itself in the physical world as Paul describes to the disobedient church at Corinth, "For this reason many among you are weak and sick, and many have fallen asleep [in death] (1 Corinthians 11:30)." Thus, accepting this vaccine is both

spiritually and physically unclean and sinful to me, a clear violation of God's Word, a violation of my conscience and my sincerely held religious belief.

15. As a requirement of the RAR process, on September 8, 2021, and October 4, 2021, I was interviewed by the Vance Air Force Base chaplain regarding my sincerely held religious beliefs.
16. On October 4, 2021, the chaplain determined that my religious beliefs were sincere and that my beliefs would be substantially burdened if I was required to take a COVID-19 vaccine. He also determined I would be sinning against God if I were to receive the currently available COVID-19 vaccines and recommended that I be granted a religious accommodation waiver from having to receive the COVID-19 vaccination.
17. As an additional requirement of the RAR process, on September 29, 2021, I was counseled by Major Alyssa Turner, USAF, NC, Aeromedical Nurse Practitioner, Vance Air Force Base, about the risks of not being vaccinated and becoming ill with COVID-19.
18. On September 29, 2021, I was counseled by my commander that noncompliance with immunization requirements may adversely affect readiness for deployment, assignment, international travel, or result in other administrative consequences. "Administrative consequences" include written counseling and administrative separation, which, if received, would detrimentally impact my career. Noncompliance could also result in nonjudicial punishment under Article 15 of the Uniform Code of Military Justice. This is where the commander offers to issue a service member punishment subject to the member's consent to be tried exclusively by the commander. As part of this process, alternatively, the member could turn down this offer and elect to be tried by court-martial.

19. Since COVID-19 mitigation measures were put into effect in March of 2020, my vaccination status did not prevent me from continuing to execute the mission to train pilots or support the Air Force Reserves in that endeavor. Since March of 2020, I have flown 351 sorties which totaled to 497 flight hours and provided approximately 684 hours of instruction to student pilots in training. Additionally, I have carried out my primary duties within my squadron by writing numerous orders for 12 traditional reservists and ensured travel vouchers were completed, leave was processed, awards and performance evaluations were written, a change of command was planned down to individuals seats and other nuanced duties of daily operations. There have been no interruptions to my job duties or my job performance throughout this time. In fact, I successfully carried out my unit's mission and at no time was there an impact to the mission as a result of COVID-19.
20. In March of 2020 until October 2020, my job duties included teaching principles of flying and evaluating overall student performance and training as a T-6 IP. In October of 2020, I became part of Squadron leadership as Assistant Flight Commander and assist the flights 16 reserve T-6 IPs in support of the mission. My purpose is to lead, mentor, & evaluate flight members. Additionally, I ensure their operational, administrative, personnel and training issues with the reserve system are taken care of along with their day-to-day order and pay issues are resolved.
21. Presently, my job duties include all the aforementioned Assistant Flight Commander duties minus being an Instructor Pilot due to the fact that I have been suspended from aviation duties.
22. After submitting my final RAR documents on October 7, 2021, on January 7, 2022, I received the initial denial of my RAR. I was officially notified of the denial on January 9, 2022.

23. The denial was issued by Lieutenant General Richard W. Scobee, USAF, Commander Air Force Reserve Command, and the reason cited was mission accomplishment, specifically the health, safety, and readiness of the force.
24. However, Lieutenant General Scobee did not address or attempt to rationalize the 2 pilots within my unit that have the same potential to impact mission success but are medically exempt from taking the COVID-19 vaccine and can still perform flying duties. There was never a requirement, to my knowledge, that they would be required to submit documents and rationale for how many people they came in contact with on a daily basis or meetings that they would attend or teleworking because the risk was too high for the vaccinated to be in their presence. Furthermore, the base and flying squadrons have both government civilian employees and contractors working among the same offices and buildings with unknown immunity status. The same threat to spread and infection exists among those employees, however, it was not even addressed in General Scobee's denial letter.
25. On January 14, 2022, I submitted my appeal to the Air Force Surgeon General. In my appeal I explained I have personally recovered from the SARS-COV-2 virus (a mild case with no lasting effects), as evidenced by two serological tests taken one year apart, dated October 20, 2020 and October 12, 2021. Results from the first serological test are in my official medical record.
26. On March 31, 2022, my appeal was denied. On April 15, 2022, Lieutenant Colonel Marcus D. Hutson, Commander 5th Flying Training Squadron, ordered me to receive an initial dose of a COVID-19 vaccine and provide proof of same by April 20, 2022.
27. The reasons cited for the denial of my appeal were prevention of the spread of disease among the force; that my present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or adequate distancing; that

my required in-person meeting attendance includes prolonged, intermittent contact with multiple individuals; that my instructor role requires frequent contact and immersion with multiple individuals, which would significantly impact training accomplishment if I, my trainees, or my fellow instructors were exposed or actively infected; that my status as a non-immunized individual, aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk; and that foregoing the immunization requirement would have a real adverse impact on military readiness and public health and safety. The denial did not state that any consideration was given to the natural immunity I acquired by contracting and recovering from the SARS-COV-2 virus.

28. While I have been mentally distraught over having to decide between my career, providing for my family of six and violating my sincerely held religious beliefs, I made the difficult decision to hold true to my faith and what the Lord has warned me that I should not receive a COVID-19 vaccine. Throughout this ordeal I have lost hours of sleep and quality time with my family writing, researching and reading everything I can find on the subject voraciously. I have loathed putting on my uniform and going to work to do a job I used to find fulfilling. The entire religious accommodation process has felt like a futile effort and waste of man-hours leading to the almost certain conclusion where I am denied a religious accommodation with mere quotations of mere regulations rather than using the actual gravity of the situation. Through all this, however, my faith and Jesus and God's will for me remains. The Lord is good and has a plan for me and my family and my hope is not in this document, a religious accommodation process, a general, an election, a politician or a judge. My hope is in the Lord because His people are His portion and His delight.

29. As a result of not taking the vaccine, on April 21, 2022, I was suspended from aviation service and my flight incentive pay and duties were suspended. My aviation incentive pay amounts to (\$1,000) per month. My Aviation Retention Bonus amounts to (\$2,917) per month. I was later notified via a memo from my Commander on May 4th citing AFMAN 11-402 paragraph 6.2.2.4 for the suspension. This reference directs commanders to suspend aviation service for Involuntary Discharge proceedings. However, I emailed and explained to my Commander that this reference was not appropriate since I am technically not being Involuntarily Discharged. If that were the case, then I should receive due process and be provided a Board of Inquiry to present my case for retention. After another individual brought up this issue, my commander notified me via a memo on May 9th that the reason for my suspension had changed to paragraph 6.2.2.5. This paragraph states that a member should be suspended from aviation service when there are pending Uniform Code of Military Justice (“UCMJ”) actions. However, I have not been notified of any “pending” UCMJ actions, Article 15’s or investigations. Ultimately, they are not following the regulation on the subject, and I have submitted an Inspector General complaint asking that they reinstate my aeronautical order and aviation pay based on the regulation.
30. It is my understanding that a Letter of Reprimand has been written for me, is being reviewed by the 22nd AF Commander, and will be delivered and placed in my permanent personnel file within the next few weeks, which guarantees I will not be promoted. I was also removed from my duties as an Instructor Pilot and presently do all the required office, meetings and paperwork as the Assistant Flight Commander.
31. Currently, I am awaiting a Letter of Reprimand within a week or two for not receiving the COVID-19 vaccine. The Letter of Reprimand will be untimely due to a Promotion

Board that my record is about to go to in June for consideration for the rank of Lieutenant Colonel. Additionally, my Squadron Commander told me that I was ranked last against my peers within the squadron instead of 2nd or 3rd (out of 5) because my Appeal to the denied RAR was not likely to succeed. The Operations Group Commander, that is one tier in the chain of command above my squadron commander, deemed that the overall recommendation of "Definitely Promote" be taken from me and given to another person more deserving because the Letter of Reprimand is pending. However, I have not received the Letter of Reprimand or been given an opportunity to make a rebuttal. If I were to receive a Letter of Reprimand at this point, an Unfavorable Information File will be established within my official record containing the Letter of Reprimand and I will not promote. If by chance, I do not receive the LOR until after the Promotion Board, my Commander told me, that it is possible that the Promotion Board's recommendation for Lieutenant Colonel will be rescinded and that I would not be able to assume the rank. While an LOR and losing rank is likely a career-killer, the ultimate harm will be the process to curtail (i.e. cancel) my AGR orders that will immediately follow. I will lose my position in the unit of which there are only 5 AGR positions that I could fill at the rank of Major and 4 other AGR positions that I could fill as a Lieutenant Colonel. However, the Lieutenant Colonel positions are for progression and leadership usually picked from the service members in the position filled by Majors. The Major positions tend to fill quickly and stay filled for 3 or 4 years until they move into a Lieutenant Colonel position making it difficult to reacquire a position after I have been removed from it. Or, I have been passed over for the position because I have fallen out of favor. More importantly, however, I will lose my primary source of income and my health insurance. Currently, my daughter is seen by a Pulmonologist for Asthma and a Pediatric

Gastroenterologist for intestinal issues on a regular basis. The disruption to her care will cause additional stress on top of seeking additional employment. I may need to move to another state and uproot my family from a town that we had hoped to stay in.

32. This entire process has been juxtaposed by the Medical Exemption process. Others who perform the same duties as me and who were granted medical exemptions to the COVID-19 Vaccine Mandate are still able to perform the normal duties as if they were vaccinated. For instance, one service member is able to travel with the Presidential Advance Team because it is considered an essential Temporary Duty. This team is responsible for coordinating with the Secret Service in preparation for Air Force One movements supporting the President's travel. For instance, the service member with the Medical Exemption traveled to Poland before the President recently traveled to Europe to plan for the President's arrival. The other individual is currently not able to go on Temporary Duty trips unless they are deemed essential. Both of these service members brief in and attend packed staff meeting offices where social distancing is not even feasible.

33. My Lieutenant Colonel Promotion board is scheduled for June. Without immediate relief, a Letter of Reprimand will be placed in my personnel file and will ensure I am not promoted. I was also told by my Commander, that an LOR after my promotion board could result in the promotion being rescinded. Additionally, I have submitted an application for a Lieutenant Colonel Active Guard Reserve position within my unit. Due to my vaccination status I was not allowed to fill that position since the policy of the 340th Operations Group (the level of command above my Squadron) has been to deny applications for those who are not in compliance with the vaccination mandate which includes those who are seeking a religious accommodation request. Additionally,

without immediate relief and following a Letter of Reprimand being placed in my personnel file and the respective response process, the Air Force will initiate the cancellation of my Active Guard Reserve Orders and all associated pay and benefits. I signed a contract to fulfill a four year Title 10 AGR order through November of 2024. In this position, I am a full-time employee of the Reserves and receive all my benefits as if I am in an Active Duty position. If my order is canceled, I will be required to quickly find employment, change insurance policies for my family and live off of savings until I am able to secure employment that does not mandate the COVID-19 vaccine or at least allows for religious accommodations.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 23, 2022.


Steven Randall Haynes

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BRYAN P. SPENCE, TYLER W. STEF,
RYAN CORCORAN, MITCHELL B. PIKE,
STEVEN R. HAYNES, ANDREW GRIEB,
DANIELLE A. RUNYAN, CHRISTOPHER M.
WU, and ALAN SOSEBEE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity
as United States Secretary of Defense,
THE UNITED STATES DEPARTMENT OF
DEFENSE, and FRANK KENDALL, in his official
capacity as United States Secretary of the Air Force,

Defendants.

Case No: 22-

DECLARATION OF LIEUTENANT COLONEL ANDREW GRIEB

Pursuant to 28 U.S.C. §1746, I, Lieutenant Colonel Andrew Grieb, under penalty of perjury, declare as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I presently reside in Oklahoma.
3. I am currently serving as a T-6 Instructor/Evaluator Pilot, which is coded as a T11K3F, Air Force Specialty Code in the United States Air Force Reserve. I am currently serving in the 5th Flight Training Squadron at Vance Air Force Base (“AFB”) in Enid, Oklahoma. I am a Traditional Reservist, meaning that I am not full time in the Air Force Reserve, and I have always maintained a civilian job for the past 20 years, in addition to my military service. I am currently employed as a commercial airline pilot for United Airlines on the Boeing 737.
4. United Airlines granted my request for a religious accommodation, and I am currently attending training to become a Captain for United Airlines on the Boeing 737. Unfortunately, I am being distracted from my airline training on a daily basis by the current threat of losing my Air Force career and retirement.
5. My military career began on February 27, 2001, when I was enlisted in the Maryland Air National Guard. On April 26, 2002, I received my commission as a 2nd Lieutenant, and served as a Pilot on the C-130J. I was activated and placed on active-duty orders for both Operation Iraqi Freedom and Operation Enduring Freedom, where I deployed on five combat rotations in theater during three different theatres of operation. I have flown the C-130J to over 47 countries. I was qualified as an Aircraft Commander, which is the civilian equivalent of the “Pilot In Command” or the equivalent of an Airline Captain.

6. Over the course of my career, I have received many awards including the following:
Meritorious Service Medal; Aerial Achievement Medal; Air and Space Commendation Medal; 5th Flight Training Squadron Exceptional Performer of the Quarter (1st Quarter 2016); 5th Flight Training Squadron Reservist of the Quarter (2nd Quarter, 2017); 33rd Flight Training Squadron Reservist of the Quarter (1st Quarter 2016); Sturon (Student Squadron) Reservist of the Quarter (2017 and 2018); Sturon Reservist of the Year 2017.
7. Most recently, I was recognized for being the 5 FTS “T-6 High Flyer” in December 2021 and January 2022, which means I was the reservist with the most T-6 sorties and flight time in support of the Active Duty Undergraduate Pilot Training (UPT) mission.
8. In 2012, I wanted to be a role model for new Lieutenants attending pilot training in the Air Force. I transferred from the Maryland Air National Guard to the U.S. Air Force Reserve and attended Pilot Instructor Training and became a T-6 Instructor Pilot at Vance AFB in Enid, Oklahoma.
9. At no time during my career have I received any form of punishment or reprimand, other than the punishment I will now face as a result of the Air Force’s COVID-19 vaccination requirement, which is explained in more detail below.
10. I have served honorably for over 21 years, and I will continue to do so, God willing.
Throughout my career, I deployed to Iraq, Afghanistan, and participated in numerous humanitarian assistance/disaster relief missions, such as Hurricane Katrina in 2005, flying to the gulf coast within hours of the storm. I have accrued over 13 years of Active-Duty Service points towards my retirement, during my 21 years of Guard and Reserve service.

11. As a T-6 Instructor Pilot in the Air Force Reserve, I am required to work a minimum of 6 days a month, 72 days a year, in addition to my United Airlines schedule. I typically work a minimum of 20 to 24 days a month in total between my flying with United Airlines and my Air Force Reserve service commitment.
12. On August 24, 2021, the Secretary of Defense issued a mandate for all members of the Armed Forces under Department of Defense authority on active duty or in the Ready Reserve, including the National Guard, to immediately begin full vaccination against COVID-19.
13. On September 3, 2021, the Secretary of the Air Force issued a similar mandate (“COVID-19 Vaccine Mandate”) requiring that commanders in the Air Force take all steps necessary to ensure all uniformed Airmen and Guardians received the COVID-19 vaccine, which included issuing unit-wide and individual orders to their military members.
14. I was initially ordered by my Squadron Commander to receive a COVID-19 vaccine on September 28, 2021, following the August 24, 2021, Secretary of Defense issued a mandate for all members of the Armed Forces under Department of Defense authority on active duty or in the Ready Reserve, including the National Guard, to immediately begin full vaccination against COVID-19.
15. On October 1, 2021, I submitted a Religious Accommodation Request (“RAR”) to be exempted from the COVID-19 vaccine requirement.
16. In my RAR, I explained that I am a Christian and a member of the Roman Catholic Church, that I believe my body is a temple to the Holy Spirit, that life is sacred at all stages (starting at conception) and that using a vaccine that was tested using aborted fetal

cells is repugnant to my religion, that blood is sacred and that it is against my faith to inject my blood with DNA-altering materials. Also, I explained that I had already contracted COVID in April of 2020 and that I had natural immunity, thereby allowing me to safely perform my job without a vaccination (as I had done for 19 months before I was ordered to receive the vaccine).

17. As a requirement of the RAR process, on October 13, 2021, I was interviewed by the Vance Air Force base chaplain regarding my sincerely held religious beliefs.
18. On October 14, 2021, the chaplain determined that my religious beliefs were sincere and that my beliefs would be substantially burdened if I was required to take a COVID-19 vaccine.
19. As an additional requirement of the RAR process, on October 1, 2021, I was counseled by Captain Andrew Carey, Flight Surgeon at Vance Air Force Base about the risks of not being vaccinated and becoming ill with COVID-19.
20. On October 1, 2021, I was counseled by my commander, and in his memorandum he stated that, “...*noncompliance with immunization requirements may adversely affect assignment, international travel, or result in other administrative consequences.*” “Administrative consequences” include written counseling and administrative separation, which, if received, would detrimentally impact my career. Noncompliance could also result in nonjudicial punishment under Article 15 of the Uniform Code of Military Justice. This is where the commander offers to issue a service member punishment subject to the member’s consent to be tried exclusively by the commander. As part of this process, alternatively, the member could turn down this offer and elect to be tried by court-martial.

21. Receipt of administrative action or nonjudicial punishment would be detrimental to my career. I am two years away from a full retirement that I wish to complete. Voluntarily retiring now would negatively impact my family's financial position. If I do not acquiesce and retire now, I will be placed in the Inactive Ready Reserve ("IRR") where I am no longer allowed to purchase Tri-Care for my family's medical needs or have access to other military benefits.
22. On January 13, 2022, I received an initial denial Memorandum stating that Lieutenant General Scobee, the Air Force Reserve Command Commander, had denied my RAR and that I had until January 15, 2022 to appeal or receive my vaccination within 5 days. Specifically, the Memorandum stated, "since less restrictive means of protecting our force from COVID-19 are unavailable, all uniformed Airmen must be fully vaccinated against COVID-19 and other infectious diseases."
23. However, General Scobee and his team did not state that any consideration was given to my natural immunity (note that I had tested positive for antibodies as recently as January 15, 2022, without a second illness) and my ability to have successfully executed my mission for the past 19 months without a vaccine as I stated in my initial RAR and subsequent appeal.
24. I appealed the initial denial on January 15, 2022.
25. After I submitted my appeal, there have been increases in restrictions to the duty I am allowed to perform. As of March 2022, unvaccinated members of my squadron are no longer allowed to perform temporary duty assignments, despite the fact that we have been traveling off station to accomplish necessary flight training operations for the past 24 months without issue. Instructor Pilots, such as myself, are expected to fly weekend

“cross country” student training events that involve overnight trips to other locations.

This provides real world, first-hand experience for Air Force Students at busy Civilian Air Traffic Control locations other than Vance, AFB. Typical travel includes travel to states within a 700 mile radius from Enid, Oklahoma. I believe that this type of duty is being taken away because it is viewed as a “good deal” by Air Force management.

Flying student sorties to other locations allows us to instruct students, while flying to other locations such as Albuquerque NM, Denver, CO, Texas, New Orleans LA, Destin FL, and a variety of other locations that are more desirable to visit than Enid, OK. These overnight trips are an added perk of instructing in the T-6 that makes the job desirable and the Air Force is restricting this. This TDY policy is inconsistent because we are still allowed to do day trips to other locations for training, but we are required to return to Vance the same day. I recently flew to Santa Fe, NM to pick up a T-6 aircraft and return the same day. This TDY order restriction is clearly not a health and safety requirement and is retaliatory and discriminatory.

26. TDY and duties that involve travel can also include special duty assignments. Two recent job opportunities that I would have applied for required travel to Georgia or Texas. However, I was told that I am not allowed to be considered because of my vaccination status.
27. As of March 22, 2022, extended Active-Duty Orders for unvaccinated reservists have been severely limited in my squadron. I am no longer being permitted to serve on additional active-duty tours of over 30 days due to my unvaccinated status, which is discriminatory treatment because orders longer than 30 days include additional special pays and benefits that I will not receive if I perform duty for 29 days.

28. Since October 1, 2021, I served on two different sets of full-time orders, (November 5, 2021 to December 26, 2021 and February 6, 2022 to March 25, 2022) totaling over 92 days of active duty so far this year, which is in addition to my normal reserve duty 72-day requirement. These orders required serving at Vance AFB as a full time T-6 Instructor Pilot. Because of the March 2022 policy change limiting my duty time to 29 consecutive days, I will only be allowed to serve on orders that are 29 days or less doing the exact same job. This is significant to me financially because active-duty orders must be over 30 days or more in order to receive full active duty pay and benefits (described below).
29. In a March 22nd, 2022 email from the 5th Flight Training Squadron Director of Operations in my squadron, Lieutenant Colonel Ian Bass, to our flight commanders outlining this new policy, he stated: *“Unvaccinated members may accomplish MPA and strings of MPA that DO NOT require a COW (Continuous Orders Worksheet), orders must be 29 days or less. ...Unfortunately, this means that a member will have to work all weekends and federal holidays, will not accrue leave, will not be eligible for TRICARE Prime, and will only get Type 2 BAH. Please make sure that your member is aware of this before they sign up for this plan.”* BAH stands for Base Housing Allowance and BAH 2 is worth approximately 60% of full time BAH 1 if we are on long term orders. This coercive policy is retribution for not receiving the COVID-19 vaccine, as it is only for unvaccinated members and has no bearing on our mission effectiveness other than to punish us financially. Prior to my final RAR denial by the Surgeon General, I was still allowed to come in on short tours of active duty and perform the same duties.
30. The loss of long-term orders over 30 days amounts to a loss of approximately a \$500 per month difference between BAH Type I and reduced BAH Type II (housing allowance).

Additionally, long-term orders allow members 10.5 days of paid time off per month, because members only are expected to work five out of every seven days, receiving essentially four weekends off per month. In addition to weekends off, members also earn 2.5 days of paid annual leave per month of long-term orders. Full-time members are entitled to “Tricare Prime” health insurance coverage which is free to the member, which is an additional savings me of over \$300 per month as a family of six.

31. I am aware of two members in my 5FTS squadron that have received Medical Exemptions to the COVID-19 shot requirement. Both of these members are on long term orders and I know both of them personally. The first individual has a previous history in her medical record of allergic reactions to previous vaccinations. To my knowledge, she did not request a RAR, but she did tell me personally that her Medical Exemption was approved. She is a Delta Airlines Pilot on military leave and is currently on full-time orders at the 5FTS. She does not want to be highlighted for fear of having her exemption cancelled. She is not allowed to conduct any TDY travel.
32. The other member also did not submit a RAR, but requested a Medical Exemption due to proof of past infection from COVID-19 in November of 2021. According to Air Force regulation AFI 48-110, members are exempt from vaccination with proof of immunity. It states, “*Evidence of immunity (for example, by serologic antibody test); documented previous infection (for example, chickenpox infection); natural infection presumed (for example, measles, if born before 1957).*” He received a 120-day exemption from receiving the COVID-19 vaccine. He told me directly that he has passed the expiration date of his exemption and he has not been pursued by our Squadron or the Vance AFB Medical Group to receive his shot at this time. He believes he has fallen through the

cracks and he does not want to be highlighted and be forced to get the shot. He is currently on full-time orders and is currently allowed to TDY to stateside and international locations for his work duties.

33. I also have previously contracted COVID-19 in April of 2020 and I have submitted all of my positive tests with my RAR request accompanied by AFI 48-110. I have a positive PCR Test from April 13, 2020 indicating I had COVID-19, along with multiple Positive Anti-body tests from as early as May 15, 2020 and most recently as January 12, 2022 still testing positive for antibodies. I am blessed that I am one of the people that recovered from COVID-19 due to my healthy immune system that God has given me, and I am protected from getting COVID-19 due to natural immunity and a reliance upon God's protection consistent with Psalm 91, Isaiah 53:5, and Psalm 103.
34. On April 28th, 2022, my appeal was denied, and I was given until May 3, 2022, to receive a COVID-19 vaccine.
35. The reasons cited for the denial of my appeal were that telework is not an option, and my aircraft instructor duties would place me in confined spaces with other Air Force members.
36. On April 28, 2022, I requested that the Air Force allow me extra time to consider my options while I am not available to be on military status due to my five week 737 Captain upgrade training program for United Airlines.
37. This request was denied on the same day. My Squadron Commander expected me to sign and complete paperwork for the Reserve Squadron while I am not on a paid status with the Air Force.

38. Now that my appeal is denied, my Squadron Commander advised me that I will soon receive a Letter of Reprimand (“LOR”) that will go in my permanent record and will negatively impact my discharge, which will be “less-than-honorable.” This service characterization will make obtaining new flying employment exceedingly difficult if not impossible should I need to seek other employment. This LOR destroys a record and career that I have worked hard to build over two decades.
39. I have already been placed on No Points No Pay status, which means I cannot perform any type of duty in a pay status and conduct Reserve Duties or earn points towards retirement.
40. As a result of my appeal denial, on May 4, 2022, I was not only adversely placed on No Points No Pay status for failing to receive a vaccination, but I was also removed from my duties as an aviator and presently am not allowed to provide any service to the Air Force. At present, my otherwise flawless and distinguished service record is now capped with an entry in my personnel record stating that I have been “suspended” from flying service, and that “Permanent Disqualification Action Pending.” This means that I am no longer allowed to fly and instruct in a position that I love. It means that since recovering from COVID in the past 24 months, I have flown more than 290 hours in the T-6 Texan as an Instructor Pilot without catching COVID again, but I am suddenly no longer suitable to fly because of my vaccination status. It means that I will not get a traditional military retirement ceremony for my friends and family to attend. This is typically where the pilot goes on one last “fini-flight”, where the pilot gets to fly the plane, taxi to a stop in front of family, and then her or she is ceremonially hosed down with a fire truck and its fire

hose in the hands of the pilot's spouse and children. Because I am no longer on flying status, it means I will not receive this recognition for 21 years of service to my country.

41. I would like to reiterate that Since COVID-19 mitigation measures were put into effect at the beginning of the pandemic, in March of 2020, and until the recent revocation of my flight orders, there have been no interruptions to my job duties or my job performance.

In fact, I successfully carried out my unit's mission and at no time was there an impact to the mission as a result of COVID-19.

42. From March of 2020 until May 4, 2022, my job duties included serving as a T-6 instructor and evaluator pilot at Vance Air Force Base with no issue.

43. While I was mentally distraught over having to decide between my career, being able to provide for my family of 4 children and my wife, or violating my sincerely held religious beliefs, I made the difficult decision to hold true to my faith and did not receive a COVID-19 vaccine. This has been an incredibly stressful ordeal. Due to the stress, my wife and I have begun going to marriage counseling. Due to the time-consuming nature of seeking an exemption, I have missed many family activities with my children.

Additionally, my wife and I have had to sell some of our property to ensure that we can sustain ourselves in the event that I am ultimately kicked-out of the Air Force.

44. Without immediate relief, I am facing an imminent issuance of a LOR to my file, which will negatively impact my discharge characterization. The stress, mental, and emotional harm to my family continues to increase every day. And being forced to choose between tarnishing my nearly two-and-a-half-decade long career or violating my sincerely held religious beliefs in order to provide for my family is a harm that cannot be repaired with money, and it is a harm that happens every day that this process drags on. My wife and I

continue to attend counseling through this ordeal in order to provide a stable, happy environment for our children. As this coercion continues to exert stress on my wife, my children, and me, I am being forced to defend my military career, which I love and very much wish to continue.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 23, 2022.

 Authentisign
Andrew T Grieb 05/25/22

Andrew T. Grieb

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BRYAN P. SPENCE, TYLER W. STEF,
RYAN CORCORAN, MITCHELL B. PIKE,
STEVEN R. HAYNES, ANDREW GRIEB,
DANIELLE A. RUNYAN, CHRISTOPHER M.
WU, and ALAN SOSEBEE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity
as United States Secretary of Defense,
THE UNITED STATES DEPARTMENT OF
DEFENSE, and FRANK KENDALL, in his official
capacity as United States Secretary of the Air Force,

Defendants.

Case No: 22-

DECLARATION OF CAPTAIN ALAN C. SOSEBEE

Pursuant to 28 U.S.C. §1746, I, Captain Alan C. Sosebee, under penalty of perjury, declare as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I presently reside in Monument, Colorado.
3. I have served as a Department of the Air Force (“Air Force”) active-duty member since February of 2013.
4. Over the course of my career, I have received the following awards: Detachment Company Grade Officer of the Month (#1/19) during my first deployment, Flight Outstanding Contributor (#1/14 peer Captains) during Squadron Officer School, 94th Flying Training Squadron (“FTS”) Instructor Pilot of the Quarter and Instructor Pilot of the Year (#1/19), 94th FTS Flight Commander of the Year, 306th Flying Training Group (“FTG”) Instructor Pilot of the Quarter and Instructor Pilot of the Year (#1/132), 12th Flying Training Wing (“FTW”) Instructor Pilot of the Quarter (#1/559), as well as the 306th Flying Training Group’s *High-Flyer* Award for calendar year 2021.
5. I have also been considered a top performer over the course of my career. In a little over a year at my first operational duty location, I was rated the #1/7 Standards and Evaluation Liaison Officers and was the 3rd Airlift Squadron Commander’s #1/27 Junior Company Grade Officers. During my time at Dover Air Force Base, I was also rated #1/5 Training Officers, #1/4 Wing Airlift Directors, #2/20 year group Company Grade Officers, and #2/20 Company Grade Officers. After I moved to the United States Air Force Academy (“USAF A”), I earned the rating of the #1 Instructor Pilot in the Squadron in just over a year. Since then I have been rated as #2/8 Captains in the Squadron and #4/23 Flight Commanders in the Flying Training Group. Additionally, I earned a spot in the top 10% of Captains in the Flying Training Group (#11/121)

and I was selected as Initial Cadre for the newest Mission Designation Series in the Air Force, the TG-17A. Most recently, I was selected to promote to the rank of Major, with a line number of 321 out of around 1100 peers across the Air Force.

6. At no time during my career have I received any form of punishment or reprimand other than the punishment I received as a result of the Air Force's COVID-19 vaccination requirement, which is explained in more detail below.

7. I am presently assigned to 94th Flying Training Squadron at the USAFA in Colorado where my current job title is Chief of Training for the 306th Flying Training Group. I have been assigned to the 94th Flying Training Squadron since September of 2018. My duties entail: leading over 250 officers, enlisted, civilians and cadet instructor pilots in North America's largest sailplane operation; developing leaders by introducing the basics of flight/instruction and mentoring the Air Force's youngest instructor pilots; coordinating, planning and executing 20,000 missions annually while overseeing a \$3M maintenance and tow-plane contract; executing 9 AETC syllabi for 1300 cadets yearly. Additional duties include: Soaring Control Officer ("SCO"), Supervisor of Flying ("SOF"), Operations Supervisor, Aerobatic Instructor Pilot, Cross-Country Instructor Pilot, and triple-qualified Evaluator Pilot for the TG-15/16/17. My sailplane qualifications expired as a result of my deployment to Saudi Arabia last year and, due to current guidance surrounding those applying for religious accommodation requests to the COVID-19 mandates, I have not been allowed to re-qualify in any of the sailplanes at USAFA.

8. On August 24, 2021, the Secretary of Defense issued a mandate for all members of the Armed Forces under Department of Defense authority on active duty or in the Ready Reserve, including the National Guard, to immediately begin full vaccination against COVID-19.

9. On September 3, 2021, the Secretary of the Air Force issued a similar mandate ("COVID-19

Vaccine Mandate”) requiring that commanders in the Air Force take all steps necessary to ensure all uniformed Airmen and Guardians received the COVID-19 vaccine, which included issuing unit-wide and individual orders to their military members.

10. On October 27, 2021, my commander issued me an order to receive the COVID-19 vaccine.

11. In response to the COVID-19 Vaccine Mandate, service members were permitted to submit a request for either a religious or medical exemption.

12. On October 29, 2021, I submitted a Religious Accommodation Request (“RAR”) to be exempted from the COVID-19 vaccine requirement.

13. In my RAR, I explained that I sincerely hold the belief that the use of cells, cellular debris, protein, and DNA from willfully aborted human children is unacceptable. Past and ongoing research on vaccines containing these ingredients violate core tenants of the Bible. I hold that supporting vaccination and vaccine development is an endorsement of the sacrifice of human souls, which I cannot reconcile with my deeply held religious beliefs. Moreover, I have a religious obligation to honor God with my body and respect His wishes in regard to my body.

The COVID-19 vaccine mandates are in direction opposition to these foundational, core beliefs and taking the vaccine would be a massive violation of my sincerely held religious beliefs. I have used many alternative COVID-19 mitigation measures with great success. I have social distanced, worn masks, teleworked, and used selective scheduling measures to reduce contacts with others throughout the pandemic. I have used these measures so effectively that even though I have deployed to the Middle East, gone on numerous temporary duty location trips (“TDYs”), and flown countless glider sorties with cadets, permanent party, and guests alike, not once did I test positive for COVID-19 throughout the entire duration of the pandemic. I did so well with these procedures that on one of the TDYs I was running, Major General Craig Wills, then 19th

Air Force Commander, came and visited us and complemented us on the exemplary job we were doing implementing these alternative COVID-19 mitigation procedures.

14. As a requirement of the RAR process, on October 28, 2021, I was interviewed by the USAFA chaplain regarding my sincerely held religious beliefs.

15. On the same day, the chaplain determined that my religious beliefs were sincere and that receiving the COVID-19 vaccine would present a substantial burden on my free exercise of religion. He also stated that he recommended for my RAR to be approved.

16. As an additional requirement of the RAR process, on or about October 27, 2021, I was counseled by a provider at the 10th Medical Group at the USAFA about the risks of not being vaccinated and becoming ill with COVID-19. I apologize that my date for this point may not be accurate. My wife and yet-to-be-born infant son had just undergone in-utero fetal surgery to correct a hindbrain herniation (Chiari II malformation) as a result of our son's myelomeningocele spina bifida, and we were living in the Ronald McDonald house close to the Children's Hospital to ensure both my wife and son had access to immediate medical care in the precarious post-surgery stage directly following the open fetal surgery.

18. Currently, I am a top performing individual who is on the "command track", expected to take a command position as soon as I am eligible and to most likely continue the upward trajectory of my career following that command position. Not only would administrative action/nonjudicial punishment derail the current trajectory of my career, but it would forever remove command from the realm of possibility. Additionally, it has not only the potential but the likelihood of withholding future assignments and promotions as well.

19. Since COVID-19 mitigation measures were put into effect at the beginning of the pandemic

in March of 2020, there have been no interruptions to my job duties or my job performance. In fact, I successfully carried out my unit's mission, and at no time was there an impact to the mission as a result of COVID-19. As I previously stated, I have never tested positive for COVID-19.

20. Between March of 2020 until now, my job duties have included: AM-250/251 Flight Commander, Director of Advanced Soaring, and Assistant Director of Operations for the 94 FTS; Air Defense Liaison to the Kingdom of Saudi Arabia; Deputy Chief of the Commander's Action Group ("CAG") for the Commandant of Cadets; and Chief of Training for the 306 FTG. My duty station during this entire time has been at the USAFA.

21. Presently, in addition to my roles at the 94th, my job duties include: Auxiliary Training Manager for the 306th, Crew Resource Management monitor, and Special Projects Manager to include the USAFA Preparatory School flying program and Integrated Training Device sustainment.

22. After submitting my RAR on October 29, 2021, on March 8, 2021, I received the initial denial of my RAR, which is dated March 4, 2021.

23. The denial was issued by Lieutenant General Webb, Air Education and Training Command commander, and the reasons cited were 1) that I am required to have close contact with students and other personnel; 2) an exemption would detract from good order and discipline by creating the perception that there are different standards for those in leadership roles; 3) unit cohesion would be negatively impacted as my ability to train and mentor pilots would be limited; 4) my lack of personal readiness would impact my ability to deploy, go in temporary duty orders, and be transferred overseas; 5) it increases the risk to my own personal health and safety and that of

those around me; and ultimately that 6) the Air Force's compelling government interest outweighs my individual belief and no lesser means satisfy the government's interest.

24. On March 11, 2022, I submitted my appeal to the 94th Flying Training Squadron Commander, and he routed it up the chain to the Air Force Surgeon General on March 14, 2022.

25. When it was found that I was appealing the denial decision, I was immediately fired from my position by Ms. Kate Russell, Lead Personnelist for USAFA/Cadet Wing, on the grounds of an assumed appeal denial and subsequent discharge (she made several discriminatory statements to me in her office such as, "If I had known you weren't going to get the vaccine, I never would have hired you.").

26. On April 8, 2022 my appeal was denied. My commander notified me of this on April 14, 2022, and I was given five days to receive a COVID-19 vaccine, apply for voluntary separation, or face mandatory disciplinary action, which would include a mandatory discharge process.

26. The reasons cited for the denial were 1) the Department of the Air Force has a compelling government interest in requiring me to comply with the requirement for the COVID-19 immunization because preventing the spread of disease among the force is vital to mission accomplishment; 2) my present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing; 3) institutionalizing remote completion of duties permanently would be detrimental to readiness, good order and discipline, and unit cohesion; 4) my health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations would place health and safety, unit cohesion, and readiness at risk; and 5) there are no less restrictive means available in my circumstances as effective as receiving immunizations in furthering these competing government interests.

27. However, Lieutenant General Miller, the Air Force Surgeon General, did not state that any consideration was given to the March 1 DoD guidance that eliminates masking and other requirements for service members, federal civilian workers, and contractors and also does not require vaccination status to be a factor in the workplace. Neither did General Miller consider the fact that the federal civilian worker and federal civilian contractor vaccination mandates are not presently in effect and that those individuals are permitted to work in close proximity with others. At the Air Force Academy we are surrounded by civilian workers and civilian contractors who may be unvaccinated, even employing several of them at the 94th, not to mention the staff in the control tower, the cleaning service, and the aircraft and facilities maintenance crews.

28. While I was mentally distraught over having to decide between my career, being able to provide for my family of six, and violating my sincerely held religious beliefs, I made the difficult decision to hold true to my faith and did not receive a COVID-19 vaccine. Being forced to go through this process has placed untold amounts of stress and anxiety on us over the past year, a year that came with monumental stressors of its own, including the marriage of my sister-in-law, the death of my wife's grandfather, the birth of my child, an extraordinarily complicated and hazardous medical diagnosis, selling a home, and a deployment. This difficult process has been harmful to our family, our mental and emotional health, and our psyche. In a time that, more than anything, should be dedicated to the care, nurture, and restoration of my family, I am spending my mornings, evenings, and weekends preparing briefs, MFRs, and reference papers to justify to a branch of the United States government why I should be allowed to exercise my First Amendment rights.

29. As a result of not taking the COVID-19 vaccine, on April 28, 2022, I received adverse

administrative action in the form of a Letter of Reprimand from Colonel Rowe, 12 FTW/CC, because I “failed to obey a lawful order to receive the COVID-19 vaccine”. I was also fired from my position in USAFA/Cadet Wing in Brig. Gen. Moga’s Commander’s Action Group when it was learned that I was appealing Lieutenant General Webb’s denial of my RAR, and presently I am working for the 306th Flying Training Group as their Chief of Training.

30. My command also will not let me fly or train students in the sailplane until the RAR process is brought to a conclusion, either by judicial relief or by my forced separation from the Air Force.

30. Without immediate relief, I am facing immediate and mandatory discharge from the armed services, the loss of my constitutional rights, and the abhorrent violation of my deeply held religious beliefs. Mandating my discharge would inflict irreparable injury on us including but is not limited to: financial instability from the loss of all pay, special incentives and bonuses in a time of great financial hardship and unrest; loss of all medical and dental benefits, including the six-month grace period generally given for those separating from the service, jeopardizing the medical care of our infant son with special medical needs during a critical time in his life; and questions around future employment brought about by the nature of the mandatory discharge.

The Air Force has been deliberate in their actions against service members who sought this religious accommodation to the COVID-19 vaccination mandates. I have exhausted every avenue for relief afforded me by military statutes, and now only injunctive relief can stem this tide and prevent my being forcibly discharged from the Air Force. Most any adverse paperwork in an officer’s official file would be a career ending event. I have no doubt I will face escalating paperwork, as my commander met with me today to advise me that he was upholding my LOR for refusing to get vaccinated. This will now remove from me the possibility of becoming a

general officer, has dashed any hopes of holding a command position, and will derail my career to the point that I may never receive another promotion.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on May 23, 2022.

DocuSigned by:
Alan Sosebee
E076830684414DA...
ALAN C. SOSEBEE

EXHIBIT 7

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION**

THE STATE OF GEORGIA, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, in his official capacity as
President of the United States, et al.,

Defendants.

CIVIL ACTION NO.: 1:21-cv-163

ORDER

Plaintiffs, comprised of the States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia; the governors of several of those states; and various state agencies, including the Board of Regents of the University System of Georgia, filed this suit seeking declaratory and injunctive relief against enforcement of Executive Order 14042, which requires, *inter alia*, that contractors and subcontractors performing work on certain federal contracts ensure that their employees and others working in connection with the federal contracts are fully vaccinated against COVID-19. (Docs. 1, 54.) Upon filing the lawsuit, Plaintiffs requested that this Court issue a preliminary injunction. (Docs. 19, 55.) Additionally, Associated Builders and Contractors, Inc. (hereinafter, “ABC”), a trade organization, and one of its chapters, Associated Builders and Contractors of Georgia, Inc. (hereinafter, “ABC-Georgia”), (hereinafter, collectively, “Proposed Intervenors”)) filed a Motion to Intervene in the action, (doc. 48), and also filed their own Motion for Preliminary Injunction, (doc. 50). The Court established an expedited briefing schedule and, following the submission of responses by the Defendants to all motions, (docs. 61,

63), and the submission of replies by Plaintiffs and by the Proposed Intervenors, (docs. 76–78), the Court conducted a hearing on the Motions on December 3, 2021.

As another Court that has preliminarily enjoined the same measure at issue in this case has stated, “[t]his case is not about whether vaccines are effective. They are.” Kentucky v. Biden, No. 3:21-cv-55, 2021 WL 5587446, at *9 (E.D. Ky. Nov. 30, 2021). Moreover, the Court acknowledges the tragic toll that the COVID-19 pandemic has wrought throughout the nation and the globe. However, even in times of crisis this Court must preserve the rule of law and ensure that all branches of government act within the bounds of their constitutionally granted authorities. Indeed, the United States Supreme Court has recognized that, while the public indisputably “has a strong interest in combating the spread of [COVID-19],” that interest does not permit the government to “act unlawfully even in pursuit of desirable ends.” Ala. Ass’n of Realtors v. HHS, 141 S. Ct. 2485, 2490 (2021) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 585–86 (1952)). In this case, Plaintiffs will likely succeed in their claim that the President exceeded the authorization given to him by Congress through the Federal Property and Administrative Services Act when issuing Executive Order 14042. Accordingly, after due consideration of the motions, supporting briefs, responsive briefing, and the evidence and argument presented at the hearing,¹ the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene, (doc. 48), **GRANTS** ABC’s Motion for Preliminary Injunction, (doc. 50), and **GRANTS** Plaintiffs’ Amended Motion for Preliminary Injunction, (doc. 55).

¹ On December 2, 2021, the American Medical Association, which is not a party to this case, was granted leave of Court to file an *amicus curiae* brief in opposition to Plaintiffs’ Amended Motion for Preliminary Injunction. (Doc. 86.)

BACKGROUND

On January 20, 2021, President Biden signed Executive Order 13991, establishing the “Safer Federal Workforce Task Force” (hereinafter, the “Task Force”). 86 Fed. Reg. 7,045–48 (Jan. 20, 2021). The Task Force’s stated mission is to “provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic.” Id. at 7,046.

On September 9, 2021, President Biden signed Executive Order 14042 (hereinafter, “EO 14042”). 86 Fed. Reg. 50,985–88 (Sept. 9, 2021). Therein, the President stated that his order would “promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument,” which would “decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government.” Id. at § 1. EO 14042 mandated that the Task Force provide, by September 24, 2021, guidance regarding “adequate COVID-19 safeguards,” which must be complied with by federal contractors and subcontractors. Id. at 50,985. This executive order specified that the Task Force’s guidance would be mandatory at all “contractor or subcontractor workplace locations” so long as the Director of the Office of Management and Budget (hereinafter, the “OMB”) approved the guidance and determined that it would “promote economy and efficiency in Federal contracting.” Id. EO 14042 states that it applies, with some specified exceptions, to “any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument;

extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument.” Id.

On September 24, the Task Force issued its Guidance for Federal Contractors and Subcontractors (hereinafter, the “Task Force Guidance”) pursuant to EO 14042. See Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, available at

https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (last visited Dec. 4, 2021). The Task Force Guidance requires all “covered contractors”² to be fully vaccinated by January 18, 2022,³ unless they are “legally entitled to an accommodation.” Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Updated November 10, 2021), at p. 5, available at https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last visited December 4, 2021). The Task Force Guidance applies to all “newly awarded covered contract[s]” at any

² “Covered contractor” means “a prime contractor or subcontractor at any tier who is party to a covered contract.” Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, at p. 3.

³ While the initial Task Force Guidance announced a deadline of December 8, 2021, on November 10, 2021, an updated version was issued which pushed the deadline for full vaccination to January 18, 2022. See Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Updated November 10, 2021), available at https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last visited December 4, 2021). This means that covered contractors’ employees would need to receive their Johnson & Johnson vaccine or the second dose of a Pfizer or Moderna vaccine by January 4 to be fully vaccinated by the deadline. See The White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies, <https://www.whitehouse.gov/briefing-room/statementsreleases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/> (last visited Dec. 4, 2021).

location where covered contract employees work and it covers “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.” Id. at pp. 3–5.

On September 28, the Director of the OMB issued a notice of her determination “that compliance by [f]ederal contractors and subcontractors with the COVID-19 workplace safety protocols detailed in th[e] [Task Force G]uidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.” 86 Fed. Reg. 53,691–92.

In order to implement the policies and requirements it established, EO 14042 directed the Federal Acquisition Regulatory Council (hereinafter, the “FAR Council”) to “amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order [a] clause” requiring compliance with the Task Force Guidance (including the vaccination requirements). 86 Fed. Reg. 50,986. The Federal Acquisition Regulation (hereinafter, the “FAR”) is the set of policies and procedures that governs the drafting and procurement processes of contracts for all executive agencies; it also contains standard solicitation provisions and contract clauses. See United States General Services Administration, Federal Acquisition Regulation (FAR), <https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation-far> (last visited Dec. 4, 2021).

On September 30, 2021, the FAR Council issued a memo to various agencies, providing direction on when and how to use the new clause, (hereinafter, the “FAR Memo”). See FAR Council Guidance, <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf> (last visited Dec. 4,

2021). The FAR Memo explains that EO 14042 directed the FAR Council to “develop a contract clause requiring contractors and subcontractors . . . to comply with [the Task Force Guidance] and to provide initial policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under FAR subpart 1.4, Deviations from the FAR.” Id. at p. 2. According to the FAR Memo, “[t]he FAR Council has opened a case (FAR Case 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors) to make appropriate amendments in the FAR to reflect the requirements of [EO 14042],” id. at p. 3, and it has “developed [a] clause”—which it included as an attachment to the memo—“pursuant to section 3(a) of the order to support agencies in meeting the applicability requirements and deadlines set forth in [EO 14042],” id. at p. 2. The attachment is entitled “FAR Deviation Clause . . . [52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors . . .],” and it states, *inter alia*:

(c) Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

Id. at pp. 4–5. The FAR Memo lists the types of solicitations and contracts in which the agencies “are *required* to include” the new clause, id. at p. 2 (emphasis added), but it also states that, “[t]o maximize the goal of getting more people vaccinated and decrease the spread of COVID-19, the Task Force *strongly encourages* agencies to apply the requirements of its guidance broadly,

consistent with applicable law, by including the clause in” other types of contracts that are not otherwise covered by EO 14042, id. at p. 3 (emphasis added).

Plaintiffs filed their Complaint initiating this action on October 29, 2021, (doc. 1), and they filed their initial Motion for Preliminary Injunction on November 5, 2021, (doc. 19). On November 10, 2021, the OMB Director issued a revised Determination that (1) revoked the prior OMB Determination; (2) provided additional reasoning and support for how the Task Force Guidance will promote economy and efficiency in government contracting; (3) gave covered contractors additional time to comply with the vaccination requirement; and (4) provided a public comment period through December 16, 2021. See 86 Fed. Reg. 63,418. In light of the revised OMB Determination, Plaintiffs filed an Amended Complaint, (doc. 54), and an Amended Motion for Preliminary Injunction, (doc. 55). Meanwhile, the Proposed Intervenors filed their Motion to Intervene as Plaintiffs, (doc. 48), and their Motion for Preliminary Injunction, (doc. 50). All parties were given an opportunity to file responsive briefs and to present evidence and argument during the hearing on December 3, 2021.

During the hearing, Plaintiffs presented testimony from representatives of three universities within the University System of Georgia: Augusta University, Georgia Institute of Technology (hereinafter, “Georgia Tech”), and the University of Georgia (hereinafter, “UGA”). (See also doc. 55-12, p. 4 (these three institutions’ federal contracts generated approximately \$736,968,899.00 in revenue in fiscal year 2021).) These witnesses each testified generally about their respective research institution’s participation in and reliance on federal contracting, and they provided data regarding the number of employees who work on federal contracts at their institution and the amount of funds received by their institution as a result of its various federal contracts.

(See, e.g., Transcript of Dec. 3, 2021 Hearing (hereinafter, “Tr.”), pp. 22–27 (testimony of Michael Shannon, Vice President and Deputy Chief Business Officer at Georgia Tech, that Georgia Tech has roughly 16,000 employees who work on contracts with the Department of Defense, the Department of Commerce, the Department of Transportation, the Department of Health and Human Services, the National Aeronautics and Space Administration (hereinafter “NASA”), the Centers for Disease Control, and other agencies, and, in fiscal year 2021, it received approximately \$664 million in federal contracts, which constitutes approximately 68% of its externally sponsored revenue); id. at pp. 67–70 (testimony of Jason Guilbeault, Director of Post-Award Services at Augusta University, that his institution receives over \$17 million per year on federal contracts, which represents about 10% of its total sponsored programs funding, and that it has roughly 5,802 employees working on federal contracts, which represents about 95% of its workforce); id. at p. 93 (testimony of Sige Burden, Senior Managing Director for Workforce Engagement at UGA, that UGA has 14,728 employees working on or in connection with federal contracts.) They also each provided even more detailed testimony about the laborious undertakings they have had to perform to comply with the mandate, particularly with the impending January 18 deadline. (See, e.g., id. at pp. 24–27 (testimony of Shannon that Georgia Tech had to “shift a tremendous amount of resources” in order to build a “team comprised of [members of the] information technology [department], [the human resources department], . . . medical and health services folks, [Georgia Tech’s] legal team, [and its] emergency services folks” to “very, very rapidly” work to “create something that didn’t exist”—a portal to “marry [human resources] data and medical data together”); id. at pp. 70 (testimony of Guilbeault about the data analytics he performed to identify the wide variety of employees who are covered by the mandate, and the software program he has

helped implement to permit employees to log in and enter their vaccination information and a scan of their vaccine card or to log in and submit questions.) Finally, they testified to having a number of employees who have not yet provided proof they are vaccinated or are in the process of becoming vaccinated, and the concern it causes them that many employees will ultimately decline to be vaccinated, meaning the institution will ultimately be non-compliant and may lose valuable employees. (See, e.g., id. at pp. 30–33 (about 20% of Georgia Tech’s employees who may be covered have not provided proof they are vaccinated); id. at pp. 71–72 (about 39% of Augusta State employees who may be covered have not provided proof); id. at pp. 92–93 (fewer than half of the University of Georgia’s employees who may be covered have provided proof of vaccination).) The Court, which heard testimony from each of these witnesses about their background and job experience and was able to observe them during both direct and cross-examination, found these witnesses to be credible.

LEGAL AUTHORITY & DISCUSSION

I. Motion to Intervene

Pursuant to Federal Rule of Civil Procedure 24(a)(2), a party is permitted to intervene as of right if (1) its application to intervene is timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) it is so situated that disposition of the action, as a practical matter, may impede or impair its ability to protect that interest; and (4) its interest is represented inadequately by the existing parties to the suit. Tech. Training Assocs., Inc. v. Buccaneers Ltd. P’ship, 874 F.3d 692, 695–96 (11th Cir. 2017). Where a party is not entitled to intervene as of right, subsection (b) of Federal Rule of Civil Procedure 24 gives a court discretion to nonetheless permit the party to intervene, on timely motion, “when a statute of the United States

confers a conditional right to intervene,” or “when [the] applicant’s claim or defense and the main action have a question of law or fact in common.” Fed. R. Civ. P. 24(b). Accordingly, when there is no right to intervene under Rule 24(a), it is wholly within the Court’s discretion to allow permissive intervention under Rule 24(b). Worlds v. Dep’t of Health & Rehab. Servs., 929 F.2d 591, 595 (11th Cir. 1991). Subsection (b) of Rule 24 instructs only that the Court must “consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

First, the Court finds that ABC, a trade organization representing tens of thousands of contractors and subcontractors that regularly bid on and work on federal contracts for services, (doc. 49-1, pp. 2–3), has an interest relating to the transaction which is the subject of the action. See N.Y. Pub. Interest Research Grp. v. Regents of Univ. of N.Y., 516 F.2d 350, 352 (2d Cir. 1975) (intervening organizations may properly assert the interests of their members). That interest is described in detail in Discussion Section II, infra, where the Court explains its conclusion that ABC has standing. Next, the Court finds that ABC’s ability to protect its interests would be impaired without intervention. In ABC’s own words, “in the event that the Proposed Intervenor cannot intervene[,] and this Court issues an adverse decision, the Proposed Intervenor will have no further recourse” and its members will have to comply with EO 14042, (doc. 49, p. 16), which—as explained throughout this Order—the Court finds costly, laborious and likely to result in a reduction in available members of the workforce. See Huff v. Comm’r of IRS, 743 F.3d 790, 800 (11th Cir. 2014) (“All that is required under Rule 24(a)(2) is that the would-be intervenor be practically disadvantaged by his exclusion from the proceedings.”). Additionally, the Motion to Intervene was timely. ABC filed its Motion to Intervene roughly twenty days after Plaintiffs filed

suit and prior to any substantive decisions having been made by the Court. At the time the Motion to Intervene was filed, Defendants had not yet responded (or been required to respond) to any substantive requests for relief in the case. Indeed, the day after ABC filed its Motion to Intervene, Plaintiffs filed their Amended Complaint (and Amended Motion for Preliminary Injunction), superseding their prior pleadings. Finally, the Court finds that ABC's interests are represented inadequately by the existing Plaintiffs. ABC represents private entities, many of whom are considered small businesses, while the Plaintiffs are all governmental officials, entities, and agencies. ABC seeks to assert a claim for violation of the Small Business Regulatory Enforcement Fairness Act, which the existing Plaintiffs have not asserted (and may not be able to assert even if they desired to do so). (See doc. 48-1, p. 40.) Additionally, the evidence presented to the Court indicates that ABC's members generally bid on and perform different types of contracts as compared to the wider-ranging types of contracts the Plaintiffs typically bid on and perform, and Plaintiffs and ABC also have different administrative systems and costs when it comes to managing their employees and workforce. Accordingly, ABC's members (as private entities) have economic interests and concerns that differ from those of the Plaintiffs.⁴ See, e.g., Kleissler v. United States Forest Serv., 157 F.3d 964, 973–74 (3d Cir. 1988) (“[T]he government represents numerous complex and conflicting interests in matters of this nature. The straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies.”); W. Energy Alliance v. Zinke, 877 F.3d 1157, 1168 (10th Cir. 2017)

⁴ As a specific example, one differing interest and strategy that was readily apparent during oral argument concerned the scope of any preliminary injunction. The existing Plaintiffs indicated they would be satisfied if the Court issued a preliminary injunction only effective in Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia, while ABC, whose members work on contracts throughout the country, urged that any preliminary injunction would need to be nationwide in order to afford it adequate relief.

(“Also, we have held that the government cannot adequately represent the interests of a private intervenor and the interests of the public.”).

ABC-Georgia, however, has failed to show that it has standing to bring the claims it seeks to assert in its proposed complaint. No evidence was presented to show that any specific member of the chapter would have standing (i.e., no evidence was presented showing that any member regularly bids on or performs contracts that would be covered under EO 14042, much less that any member wishes to bid on any upcoming contracts that would be covered by EO 14042 but believes it cannot feasibly do so due to the vaccine requirement).

In light of the foregoing, the Court finds that ABC is entitled to intervene as of right in this case pursuant to Federal Rule of Civil Procedure 24(a). Even if it were not permitted to intervene as of right, the Court would exercise its discretion pursuant to subsection (b) of Rule 24 to permit it to intervene because, for the reasons described above, its claims and the main action “have a question of law or fact in common,” Fed. R. Civ. P. 24(b), and its intervention will not result in any undue delay or prejudice to the adjudication of the original parties’ rights. The Court, however, finds that ABC-Georgia lacks standing to assert its claims and thus is not entitled to intervene. Accordingly, the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene. (Doc. 48.)

II. Standing

“[The] standing doctrine . . . requir[es] plaintiffs to ‘alleg[e] such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court’s remedial powers on [their] behalf.’” Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)). To establish Article III standing a

plaintiff must show that it: “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” Spokeo v. Robins, 578 U.S. 330, 338 (2016).

Defendants have focused much of their standing challenge on arguing that Plaintiffs have not “provide[d] [any] evidence that they are (1) parties to a federal contract that already has the challenged clause; or (2) parties to an existing covered contract that is up for an option, extension, or renewal that must include the clause,” and that they have not “identif[ied] any specific, covered solicitations that they plan to bid on or contracts that they plan to enter into in the immediate future.” (Doc. 63, p. 3.) Notably, however, prior to the hearing, Plaintiffs filed the “Supplemental Declaration of Michael Shannon,” which shows that Georgia Tech is a finalist in response to a solicitation, in excess of \$250,000, issued by NASA. (Hearing Exhibit (hereinafter, “Exh.”) P-22 (also available at doc. 76-1).) According to the Declaration (and as confirmed during Mr. Shannon’s live testimony at the hearing and supported by exhibits to his Supplemental Declaration), in October 2021, “the solicitation was amended to include Federal Acquisition Regulation (FAR) clause 52.223-99” and “Georgia Tech was required to agree to FAR clause 52.223-99 to maintain its eligibility for the contract award pursuant to the NASA solicitation.” (Id.; see also Tr., pp. 23–24, 43) Accordingly, Plaintiff Board of Regents of the University System of Georgia has standing because it has shown that one of its institutions (Georgia Tech) is a finalist for a contract with NASA and it has been advised that, if it is awarded the contract, the at-issue clause must be included in the contract.⁵

⁵ At the hearing, counsel for Defendants conceded that this bestows at least limited standing to certain Plaintiff(s), but she argued that the standing is “limited to that particular contract.” (Tr., pp. 17–18.)

Additionally, ABC, which the Court permits, through this Order, to intervene as a Plaintiff, has standing. An organization may sue “on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” Greater Birmingham Ministries v. Sec’y of Ala., 992 F.3d 1299 (11th Cir. 2021). ABC, a construction industry trade association, has provided sworn declarations showing that at least two of its members “intended to bid” on specified upcoming federal construction projects, but, following EO 14042, have concluded that it is not practical for them to do so because they likely will not have sufficient employees to perform the job if they enter into a contract that requires all of the covered employees to be vaccinated. (See Exh. ABC-3 (declaration of President of McKelvey Mechanical, Inc., explaining that his company, which is a member of ABC, “traditionally bids many federal projects per year and usually performs 4–6 per year,” but a majority of his employees are not vaccinated and many unvaccinated employees have stated that they will quit if they are required to be vaccinated); see also Exh. ABC-2 (declaration of Executive Vice President of Cajun Industries Holdings, LLC, explaining that there are “a number of forthcoming solicitations by the Army for construction projects of the type that Cajun would normally bid upon and perform, and which [it] desire[s] to bid for” but because the projects would fall under EO 14042, it will likely be unable to bid because it has reason to believe that many of its unvaccinated workers (over half its total workforce) will quit if they are required to be vaccinated).) ABC also provided evidence—using information gathered from the General Services Administration’s Website for federal contracts—that the federal government frequently and routinely issues solicitations and pre-solicitations for bids on

construction contracts (which ABC's members would normally bid on and be qualified to perform) that would be covered by EO 14042. (Exh. ABC-4.) Coupling that evidence with the sworn testimony provided by ABC, the Court finds that ABC has members that would otherwise have standing to sue in their own right. The Court also concludes that, as a trade association for thousands of contractors, the interests ABC seeks to protect in this lawsuit are germane to its purpose. The Court also finds that neither the claims asserted nor the relief requested (declaratory and injunctive relief) require the participation of individual members in the lawsuit. Greater Birmingham Ministries, 992 F.3d at 1316 n.29 (“[P]rospective relief weigh[s] in favor of finding that associational standing exists.”). Accordingly, ABC has standing.

It is well-established that, where there are multiple parties petitioning for injunctive relief, “[o]nly one petitioner needs to have standing to authorize review.” Massachusetts v. E. P.A., 549 U.S. 497, 498 (2007); see also Town of Chester, 137 S. Ct. at 1650. Here, two parties petitioning for declaratory and injunctive relief (ABC and the Board of Regents of the University System of Georgia) have standing; accordingly, Defendants’ challenge to the lawsuit on this ground fails.

Even without these showings about specific bids and/or contracts, the Court would be inclined to find that Article III standing exists based on the ample evidence (including declarations and live testimony presented at the hearing) showing that the State Plaintiffs (including many of their agencies) and members of ABC (as described in the preceding paragraph) routinely enter into contracts that would be covered by EO 14042,⁶ have current contracts that could easily fall under

⁶ According to the Declaration of Bill Anderson, the President and CEO of ABC’s Georgia chapter, “[a]ccording to recent data posted on the government website www.usaspending.gov, ABC member general contractors compose a crucial segment of the construction industry’s federal contracting base as ABC members won 57% of the \$118 billion in direct federal U.S. construction contracts exceeding \$25 million

the requirements of EO 14042 (if, for instance, they are renewed, modified, or have options that are exercised), and have shown that they would typically continue to seek out contract opportunities with the federal government that now will be covered by EO 14042. (See, e.g., doc. 55-6 (University of Idaho has federal contracts totaling approximately \$22 million per year, based on average of last three years); doc. 55-10 (Utah Department of Health has federal contracts totaling \$811,000); doc. 55-14 (Alabama Department of Agriculture and Industries has federal contracts and has leased land to the United States Department of Agriculture continuously for the past 26 years).) See Adarand Contractors, Inc. v. Pena, 515 U.S. 200, 211 (1995) (When a claim involves a challenge to a future contracting opportunity, the pertinent question for determining whether an alleged injury is sufficiently imminent is whether Plaintiffs “ha[ve] made an adequate showing that sometime in the relatively near future [they] will bid on another Government contract [of the type at issue in the case].”).

Based on all the foregoing, the Court concludes that Plaintiffs have standing. The Court addresses the parties’ debate over whether Plaintiffs have shown a sufficient injury-in-fact at length in Discussion Section III.C, infra, and, for the reasons provided therein, concludes that a sufficient injury has been shown.

III. Motions for Preliminary Injunction

A. Standard of Review

To be entitled to a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of ultimate success on the merits; (2) an injunction or protective order is necessary to prevent

awarded during fiscal years 2009–2020.” (Doc. 49-1, p. 4 (citing USASpending.gov data (accessed Dec. 22, 2020) cross-referenced with ABC membership).)

irreparable injury; (3) the threatened injury outweighs the harm the injunction would inflict on the non-movant; and (4) the injunction or protective order would not be adverse to the public interest. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225–26 (11th Cir. 2005). In the Eleventh Circuit, an “injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the ‘burden of persuasion’ as to the four requisites.” Horton v. City of Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001). If a plaintiff succeeds in making such a showing, then “the court may grant injunctive relief, but the relief must be no broader than necessary to remedy the constitutional violation.” Newman v. Alabama, 683 F.2d 1312, 1319 (11th Cir. 1982).

B. Likelihood of Success on the Merits

The likelihood of success on the merits is generally considered the most important of the four factors. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). If Plaintiffs cannot satisfy their burden with respect to this factor, the Court need not consider the other three factors. GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng’rs, 788 F.3d 1318, 1329 (11th Cir. 2015). Although Plaintiffs raise multiple claims against Defendants, Plaintiffs need only show a substantial likelihood of success on the merits on one claim. See Schiavo, 357 F. Supp. 2d at 1383, *aff’d* 403 F.3d 1223 (11th Cir. 2005) (noting that “[t]o obtain temporary injunctive relief, [the plaintiffs] must show a substantial likelihood of success on at least one claim”).

1. Whether the Procurement Act Authorized the President to Issue EO 14042

The President expressly relied on the Federal Property and Administrative Services Act, 40 U.S.C. § 101 et seq. (hereinafter, the “Procurement Act”), for his authority to issue EO 14042 “in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce.” 86 Fed. Reg. 50,985–88. The

Procurement Act was “designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector. These goals can be found in the terms ‘economy’ and ‘efficiency’ which appear in the statute and dominate the sparse record of the congressional deliberations.” Am. Fed’n of Labor and Congress of Indus. Orgs. v. Kahn, 618 F.2d 784, 787–88 (D.C. Cir. 1979).⁷ In Khan, the Court of Appeals for the District of Columbia Circuit examined the history of and apparent congressional intent behind the Procurement Act, and stated its belief that, “by emphasizing the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies, Congress intended that the President play a direct and active part in supervising the Government’s management functions.” Id. at 788. The court acknowledged that, “To define the President’s powers under Section 205(a) [(40 U.S.C. § 121(a))], some content must be injected into the general phrases ‘not inconsistent with’ the [Procurement Act] and ‘to effectuate the provisions’ of the Act.” Id. After considering the Procurement Act’s emphasis on promoting “economy” and “efficiency” and ensuring contracts are awarded on terms that are “most advantageous to the Government, price and other factors considered,” the Kahn court stated that the Procurement Act “grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole. And that direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency.” Id. at 789.

⁷ The Court has been unable to find—and the parties have not pointed to—any relevant case law from the Court of Appeals for the Eleventh Circuit grappling with the scope of the authority granted to the President in the Procurement Act.

While the Procurement Act explicitly and unquestionably bestows some authority upon the President, the Court is unconvinced, at this stage of the litigation, that it authorized him to direct the type of actions by agencies that are contained in EO 14042. Pursuant to clear United States Supreme Court precedent, Congress is expected to “speak clearly” when authorizing the exercise of powers of “vast economic and political significance.” Ala. Ass’n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (quotations omitted); see also Utility Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014). The Court has already described in detail the extreme economic burden the Plaintiffs have suffered and will continue to suffer in endeavoring to comply with EO 14042 (not to mention the impediment it will likely pose to some Plaintiffs’ (in particular, ABC’s members’) ability to continue to perform federal contract work). Additionally, the direct impact of EO 14042 goes beyond the administration and management of procurement and contracting; in its practical application (requiring a significant number of individuals across the country working in a broad range of positions and in numerous different industries to be vaccinated or face a serious risk of losing their job), it operates as a regulation of public health. It will also have a major impact on the economy at large, as it limits contractors’ and members of the workforce’s ability to perform work on federal contracts. Accordingly, it appears to have vast economic and political significance.

The issue, then, is whether Congress, through the Procurement Act, has “clearly” authorized the President to issue the directives contained in EO 14042, or whether, instead, EO 14042 “bring[s] about an enormous and transformative expansion in . . . regulatory authority without clear congressional authorization,” Utility Air Regul. Grp., 573 U.S. at 324. Looking to the Kahn court for guidance, the Court considers whether EO 14042 fits within Congress’s grant

to the President, through the Procurement Act, of “particularly direct and broad-ranging authority over those larger *administrative and management issues* . . . that . . . should be used in order *to achieve a flexible management system* capable of making sophisticated judgments in pursuit of economy and efficiency.” Kahn, 618 F.2d at 789 (emphases added). The Court finds that Plaintiffs have a likelihood of proving that Congress, through the language it used, did not clearly authorize the President to issue the kind of mandate contained in EO 14042, as EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health,⁸ which is not clearly authorized under the Procurement Act.⁹

⁸ During oral argument, counsel for Defendants urged that vaccine mandates are needed in order to “efficiently manage our way out of this pandemic.” (Tr., p. 153.) However, the issue here is far more nuanced and requires a finding that *Congress* clearly gave the *President* authority to require all individuals who work on or in connection with a federal contract (valued over \$250,000) to be fully vaccinated against COVID-19.

⁹ The Court acknowledges that, one day prior to the entry of this Order, the Eleventh Circuit Court of Appeals issued an opinion, in a separate case, refusing to preliminarily enjoin enforcement of an interim rule issued by the Secretary of Health and Human Services requiring facilities that provide health care to Medicare and Medicaid beneficiaries to ensure that their staff are fully vaccinated against COVID-19. See Florida v. Dep’t of Health and Human Servs., No. 21-14098-JJ, 2021 WL 5768796, at *1 (11th Cir. Dec. 6, 2021), available at . Defendants in this case notified the Court that the Florida opinion “supplements their merits arguments” (though they neglected to elaborate as to how), but the Court finds the case at hand to be materially different, in numerous ways, from the case before the Eleventh Circuit. First, in the Florida opinion, the court addressed very different statutory and regulatory schemes, the Medicare and Medicaid statutes and the regulations governing conditions for facilities to participate in those programs. Id. at *1–2. Nothing in the Florida case bears on whether the President is authorized, under his authority pursuant to the Procurement Act, to require private companies that enter into federal contracts to, in turn, require virtually all of their employees to be vaccinated. Additionally, in the Florida case and unlike in the case at hand, the challenged directive is similar to the authorizing statutes, because they “both directly relate to efforts to prevent the spread of disease at facilities treating Medicare or Medicaid patients to protect the health and safety of those patients.” Id. at *13; see also id. at *1–2 (“For both the Medicare and Medicaid programs, Congress charged the Secretary with ensuring that participating facilities protect the health and safety of their patients,” and the at-issue interim rule issued by the Secretary “amend[ed] the infection-control regulations for facilities that participate in Medicare or Medicaid . . . [to] require[] that facilities certified to participate in Medicare or Medicaid ensure their staff are fully vaccinated against COVID-19, unless an employee is exempt . . .”). By contrast, here, while EO 14042 relates to efforts to prevent the spread of disease in any place an individual is working on or in connection with a federal contract, the at-issue claimed authorizing statute relates to the President’s authority to take actions to “achieve a flexible

Even if, however, EO 14042 did not trigger the specific requirement that Congress “speak clearly” in authorizing the challenged executive action, the Court additionally finds that Plaintiffs have a likelihood of proving that EO 14042 does not have a sufficient nexus to the purposes of the Procurement Act and thus does not fall within the authority actually granted to the President in that Act.

For essentially the same reasons recited in the preceding subsection, the Court finds that the directives contained within EO 14042 were not authorized by the Procurement Act. Defendants claim that, “[t]o anyone who has lived through the COVID-19 pandemic and its resulting economic turmoil, the nexus between reducing the spread of COVID-19 and economy and efficiency is self-evident.” (Doc. 63, p. 16.) They emphasize EO 14042’s explanation that “[the] safeguards [in the Task Force Guidance] will decrease the spread of COVID-19, which will decrease work absence, reduce labor costs, and improve the efficiency of contractors and subcontractors” and they argue that this “easily satisfies [the] lenient standard” of a sufficiently close nexus between the executive order and the purpose of the Procurement Act. (*Id.* (quoting 86 Fed. Reg. 50,985–88).) Defendants are correct that the President has typically been afforded deference when courts review executive orders issued pursuant to the Procurement Act. *See, e.g., Chamber of Com. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) (“The President’s authority to pursue ‘efficient and economic’ procurement . . . certainly reach[es] beyond any narrow concept

management system capable of making sophisticated judgments in pursuit of economy and efficiency” in government procurement and contracting, *see Kahn*, 618 F.2d at 789. Put simply, the authorizing statute in the *Florida* case authorized the executive to implement a health and safety measure while the relied upon statute in this case does not. The differing results in this case, the *Florida* case, and other cases challenging governmental actions to address the COVID-19 pandemic underscore the point that the focus of these cases is not on the effectiveness of vaccines and other measures but rather the legality of the Government’s actions.

of efficiency and economy in procurement.”) (collecting examples). However, that deference was expressly *not* intended to operate as “a blank check for the President to fill in at his will.” Kahn, 618 F.2d at 793. The President’s directives still must be “*reasonably* related” to the purposes of the Procurement Act, Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 170 (4th Cir. 1981) (emphasis added), and Defendants have not cited to a case upholding the use of the Procurement Act “to promulgate such a wide and sweeping public health regulation as mandatory vaccination for all federal contractors and subcontractors,” Kentucky v. Biden, 2021 WL 5587446, at *9. Nor have Defendants cited to a case upholding some action or requirement undertaken pursuant to the Procurement Act that the Court finds analogous to the mandates in EO 14042. While the Court is aware of cases where courts have held that a variety of types of executive orders were authorized under the Procurement Act, none have involved measures aimed at public health and none have involved the level of burdens implicated by EO 14042, which has already required and will continue to require extensive and costly administrative work by employers and will force at least some individuals to choose between getting medical treatment that they do not want or losing their job (and facing limited job replacement options due to the mandate). Cf. UAW-Labor Emp. & Training Corp. v. Chao, 325 F.3d 360, 366–67 (D.C. Cir. 2003) (sufficiently close nexus between Procurement Act and executive order requiring federal contractors to post notices at all of their facilities informing employees of rights under federal labor law that protect employees from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities); Kahn, 618 F.2d at 786–87 (sufficiently close nexus between Procurement Act and executive order that required certain federal contractors to comply with wage and price controls). Following the Defendants’ logic and reasoning, the Procurement Act would be construed to give the President

the right to impose virtually any kind of requirement on businesses that wish to contract with the Government (and, thereby, on those businesses' employees) so long as he determines it could lead to a healthier and thus more efficient workforce or it could reduce absenteeism. Simply put, EO 14042's directives and resulting impact radiate too far beyond the purposes of the Procurement Act and the authority it grants to the President. Accordingly, the Court concludes, based on the limited record before it, that Plaintiffs are more likely than Defendants to succeed on the issue of whether there is a sufficiently close nexus between EO 14042 and the purposes of the Procurement Act.

2. Other Grounds Upon Which Plaintiffs Challenge EO 14042

In further support of their request for a preliminary injunction, Plaintiffs also claim that Defendants issued the Task Force Guidance and the FAR Deviation Clause, which they claim constitute final agency action, without complying with the Administrative Procedure Act's notice-and-comment requirements. (Doc. 55, pp. 17–22.) The Court declines to wade into this issue given its determination that Plaintiffs have a likelihood of success on the merits on other grounds.

Additionally, Plaintiffs allege that, if the Procurement Act does indeed authorize the directives issued in EO 14042, then the Procurement Act and EO 14042 are unconstitutional under the non-delegation doctrine and because they exceed Congress's authority and intrude on state sovereignty. This Court need not and does not issue any determination as to those challenges to resolve the motions before it. However, it is worth noting that other Courts have either expressed agreement with or at least concern about these arguments, *see, e.g., BST Holdings, LLC v. Occupational Safety and Health Admin.*, 17 F.4th 604, 616–18 (5th Cir. 2021); *Kentucky*, 2021 WL 5587446, at *9.

C. Irreparable Injury Requirement

In order to satisfy the irreparable injury requirement, a party must show that the threat of injury is “neither remote nor speculative, but actual and imminent.” Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 973 (2d Cir. 1989)); see also Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994) (In order to obtain injunctive relief, a plaintiff must show “a real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury.”).

Defendants argue that losing contracts would not be irreparable harm—because there are administrative processes through which Plaintiffs can seek to challenge the contractual provision and to recover losses on contracts—and they claim that Plaintiffs have not “demonstrated that the compliance costs they claim to have incurred are in fact tied to such contracts.” (Doc. 63, p. 4.) As referenced previously in this Order, the Court heard from three witnesses who described the incredibly time-consuming processes they have undertaken (typically requiring major input and assistance from numerous other departments across their institution) to identify the employees covered by the mandate and to implement software and technology to ensure that those employees have been fully vaccinated (or have requested and been granted an accommodation or exemption) by the deadline in January. Not only must Plaintiffs ensure that their own employees satisfy the mandate, but they also must require that any subcontractors’ employees working on or in connection with a covered contract are in compliance. The declarations of representatives of ABC members Cajun Contracting and McKelvey show similar administrative burdens and costs—though on a smaller scale. (See Exhs. ABC-2, ABC-3.) Moreover, “complying with a regulation

later held invalid almost always produces the irreparable harm of nonrecoverable compliance.” BST Holdings, 17 F.4th at 618 (citing Texas v. EPA, 829 F.3d 405, 433 (5th Cir. 2016)). The Court finds that the time and effort spent on these measures in the past—and going forward—constitute compliance costs resulting from EO 14042, which appear to be irreparable. See id. (“[T]he companies seeking a stay in this case will also be irreparably harmed in the absence of a stay, whether by the business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, [or] the diversion of resources necessitated by the Mandate”); see also Odebrecht Constr., Inc. v. Sec’y, Fla. Dep’t of Transp., 715 F.3d at 1289 (“[N]umerous courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable.”).

D. Balancing of the Harms

Defendants contend that, even assuming Plaintiffs have shown a risk of irreparable injury, no injunction should issue because more harm would result from enjoining EO 14042 and further delaying the vaccination of the thousands of currently-unvaccinated individuals working on federal contracts (thereby permitting the continued spread of COVID-19). The Court disagrees. Enjoining EO 14042 would, essentially, do nothing more than maintain the status quo; entities will still be free to encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated. In contrast, declining to issue a preliminary injunction would force Plaintiffs to comply with the mandate, requiring them to make decisions which would significantly alter their ability to perform federal contract work which is critical to their operations. Indeed, it appears that not granting an injunction could imperil the financial viability of many of ABC’s members. Additionally, requiring compliance with EO 14042 would likely be life altering for many of

Plaintiffs' employees as Plaintiffs would be required to decide whether an employee who refuses to be vaccinated can, in practicality, be reassigned to another office or another task or whether the employee instead must be terminated. "[A]ny abstract 'harm' a stay might cause . . . pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies." BST Holdings, 17 F.4th at 618. Accordingly, the Court finds that the balancing of the harms weighs heavily in favor of enjoining the enforcement of EO 14042.

E. Public Interest

"For similar reasons, a stay is firmly in the public interest. From economic uncertainty to workplace strife, the mere specter of [EO 14042] has contributed to untold economic upheaval in recent months" and "the principles at stake when it comes to [EO 14042] are not reducible to dollars and cents." Id. at 619.

F. Scope of Injunctive Relief

The Court now must determine the appropriate scope of the injunctive relief. Generally, the Court treads lightly when issuing injunctive relief and resists the entry of "universal" or "nationwide" injunctions, and recognizes the need to "allow legal questions to percolate through the federal court system," Kentucky, 2021 WL 5587446, at *14 (citing Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) and Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring)). While the original Plaintiffs to this case are (or are based in) a limited number of states, the Court has, in this Order, permitted ABC, a trade association with members "all over the country," (doc. 50-1, p. 3), to intervene as a Plaintiff. Not only is the geographic scope of ABC's membership broad, their involvement in federal contracts is as well. As noted above, they were awarded 57% of federal contracts exceeding \$25 million

during fiscal years 2009–2020. Accordingly, if the Court were to enjoin the enforcement of the mandate only in the Southern District of Georgia or only in Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia, then ABC’s members would not have injunctive relief as to covered contracts in other states.¹⁰ Furthermore, given the breadth of ABC’s membership, the number of contracts Plaintiffs will be involved with, and the fact that EO 14042 applies to subcontractors and others, limiting the relief to only those before the Court would prove unwieldy and would only cause more confusion. Thus, on the unique facts before it, the Court finds it necessary, in order to truly afford injunctive relief to the parties before it, to issue an injunction with nationwide applicability.

CONCLUSION

In light of the foregoing, the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene, (doc. 48), **GRANTS** ABC’s Motion for Preliminary Injunction, (doc. 50), and **GRANTS** Plaintiffs’ Amended Motion for Preliminary Injunction, (doc. 55).¹¹ Accordingly, the Court **ORDERS** that Defendants are **ENJOINED**, during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America. The Court further **DIRECTS** the Clerk of Court to **UPDATE** the docket to reflect the addition of Associated Builders and Contractors, Inc., as a Plaintiff in this case. Because the proposed

¹⁰ The Court is mindful of the fact that at least some of ABC’s members are already able to benefit from the injunctive relief recently afforded by the District Court for the Eastern District of Kentucky as to covered contracts in Kentucky, Ohio, and Tennessee. See Kentucky, 2021 WL 5587446, at *14.

¹¹ Plaintiffs’ initial Motion for Preliminary Injunction, which was superseded by the Amended Motion for Preliminary Injunction that they later filed, is **DENIED AS MOOT**. (Doc. 19.)

Complaint filed on the docket includes ABC-Georgia (which has not been allowed to intervene) as a plaintiff, the Court **ORDERS** Associated Builders and Contractors, Inc., to file a revised version of its Complaint within **SEVEN (7) DAYS**.

SO ORDERED, this 7th day of December, 2021.



R. STAN BAKER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

EXHIBIT 8

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-3, on behalf of themselves and all others similarly situated; **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1**, on behalf of himself and all others similarly situated; **U.S. NAVY SEALs 4-26**; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5**; and **U.S. NAVY DIVERS 1-3**,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, in his official capacity as United States Secretary of the Navy,

Defendants.

Case No. 4:21-cv-01236-O

DECLARATION OF NAVY SEAL 26

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I have served as a Navy SEAL since 2014.
3. I submitted a supplemental declaration in this case on December 24, 2021, which discusses my efforts to travel to the National Intrepid Center of Excellence (NICoE), a treatment program for traumatic brain injuries at Walter Reed National Military Medical Center in Bethesda, Maryland.

4. I requested temporary duty (TDY) orders that would permit me to travel by car to this treatment program, which is scheduled for January 31, 2022. My request was still pending at the time I filed my last declaration.

5. I received word on January 3, 2022 that my request was officially denied by my command because I am unvaccinated against COVID-19. I am informed that command is denying TDY orders to travel for medical care for unvaccinated service members.

6. My Religious Accommodation request is still pending on appeal, so I cannot be classified as a “refuser.”

7. One of the officers in my command was trying to see if I could at least get leave approved so I could attend the program out of my own pocket.

8. On January 20, 2022, my senior chief called to tell me that NICoE gave my slot to someone else.

9. The same day, I called NICoE myself to verify this information. The woman I spoke with confirmed that they had to fill my slot because I was unable to get approval to go and their treatment slots are limited. She said she had recently received a lot of calls from high-ranking Naval officers asking if they refuse treatment to unvaccinated people. NICoE does not require vaccination in order to get treatment.

10. I have now been kept from receiving TBI treatment at this program twice because of the Navy’s implementation of the COVID-19 vaccination mandate and associated policies restricting travel for unvaccinated service members, both before and after this Court’s preliminary injunction was entered.

//

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I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on January 28, 2022.

/s/ Navy SEAL 26
NAVY SEAL 26

EXHIBIT 9

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-3, on behalf of themselves and all others similarly situated; **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1**, on behalf of himself and all others similarly situated; **U.S. NAVY SEALs 4-26**; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5**; and **U.S. NAVY DIVERS 1-3**,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, in his official capacity as United States Secretary of the Navy,

Defendants.

Case No. 4:21-cv-01236-O

DECLARATION OF NAVY SEAL 21

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I have served as a Navy SEAL since 2011.
3. I am assigned to SEAL Team 5 along with Navy SEAL 25. I object to receiving a COVID-19 vaccination based on my sincerely held religious beliefs. I submitted a request for Religious Accommodation to the Navy in October 2021. It is still pending.
4. I have since been kicked out of my platoon. Navy SEAL 25 and I were forced to turn in our gear (helmets, armor plates, etc.) that we need for training with our Team. We have

been unable to participate in training with our Team and have been standing watch at a desk instead when we report for work. The command told us that we need to focus on getting out of the Navy, not training.

5. Even after this Court issued the preliminary injunction, Navy SEAL 25 and I have not been given our gear back, nor have we been permitted to train with our Team. If we cannot train with our Team, we cannot be deployed with our Team. Instead, we have been grouped together with another SEAL who submitted a Religious Accommodation request (RA) and was kicked out of his platoon.

6. I was scheduled to take the Chiefs examination in January 2022.

7. On January 10, 2022, I was informed by my command that I was ineligible to take the Chief exam due to NAVADMIN 225/21 paragraph 7.D, because I am “refusing the vaccine.” A true and correct copy of the email I received is attached to this Declaration as Exhibit A.

8. My RA is still pending, so I am not a “refuser.”

9. On January 17, I received an email from my command stating that Group changed their minds and would allow me to take the Chief exam “in case things get over turned.” The email also reminded me to upload my current evaluation from my Team commander, which is required as part of the promotion process. A true and correct copy of the email I received is attached to this Declaration as Exhibit B.

10. I took leave on January 18. When I returned on January 24, I learned that Navy SEAL 25 and the other SEAL with an RA had been ordered to pull weeds around the command and stand overnight watches on weapons for our old platoon. These are not typical duties and I’ve never heard of anyone outside a platoon to be assigned to watching the platoon’s weapons.

11. On January 24, 2022, I took the Chiefs examination. On my paperwork, however, it stated explicitly that I was unable to promote pursuant to NAVADMIN 225/21 due to being unvaccinated.

12. According to the typical promotion process, my Chief would show me my evaluation long before the advancement test and go over it with me. I never received it. I've since learned that my Team did my evaluation for last year but I have not been allowed to see it.

13. On January 25, SEAL 25, the other SEAL with an RA, and I were told by our Chief that our job was to walk around the base and pick up trash and clean up. Afterward, we have to report back to the Chief and tell him what we picked up or cleaned up.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on January 28, 2022.

/s/ Navy SEAL 21
NAVY SEAL 21

EXHIBIT 10

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-3, on behalf of themselves and all others similarly situated; **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1**, on behalf of himself and all others similarly situated; **U.S. NAVY SEALs 4-26**; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5**; and **U.S. NAVY DIVERS 1-3**,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, in his official capacity as United States Secretary of the Navy,

Defendants.

Case No. 4:21-cv-01236-O

DECLARATION OF NAVY SEAL 13

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I have served as a Navy SEAL since 2011.
3. I submitted declarations in support of the preliminary injunction in this case on November 24 and December 16, 2021, which discuss the fact that I was removed from a four-month course (despite completing over half) for submitting a Religious Accommodation (RA) request.

4. The course was for a critical qualification for being at my current command and for being in the position of Lead Petty Officer (LPO), which I was at the time.

5. I was subsequently removed from my leadership position and replaced with another E6 who doesn't have the course qualification I would have had if I had not been removed from the course.

6. I have not been offered a chance to complete the course or resume my leadership duties.

7. I have seventeen years of service, and only have three left until retirement.

8. As a result of being removed from my milestone leadership position, I will not be eligible for promotion to E7, despite the fact that I took my Chief examination on January 26, 2022.

9. If I cannot promote to the next pay grade (as I would have had I been able to complete the course and remain in my LPO position), I will be forced to retire at a lower pay grade, which affects my pension.

10. I think my command expects me to be kicked out of the Navy soon. I am not being allowed to deploy or even to train. Most of the time, I do not even have to come into work because there is nothing for me to do.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on January 29, 2022.

/s/ Navy SEAL 13
NAVY SEAL 13

EXHIBIT 11

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-3; on behalf of themselves and all others similarly situated; **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1**, on behalf of himself and all others similarly situated; **U.S. NAVY SEALs 4-26**; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5**; and **U.S. NAVY DIVERS 1-3**,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, in his official capacity as United States Secretary of the Navy,

Defendants.

Case No. 4:21-cv-01236-O

DECLARATION OF U.S. NAVY SEAL 22

Pursuant to 28 U.S.C. §1746, I, U.S. Navy SEAL 22, declare under penalty of perjury as follows:

1. I am over the age of eighteen and competent to make this declaration.
2. I am one of the original Plaintiffs in this litigation.
3. I submitted several declarations in this matter that outline my religious objections to the COVID-19 vaccine and the adverse actions the Navy has taken against me. Since January 3, 2022, I have been protected from separation because of the preliminary injunction.

4. Even though the COVID-19 mandate has now been repealed, consequences of the mandate still exist and personally impact my career in the Navy.

5. Since September 2019, I have ranked as an E-7. In November 2021, I was officially serving in a milestone position as Platoon Chief of SEAL Team 7. A milestone position is a leadership position that must be successfully completed before promoting to the next rank. To be eligible for a milestone, one must screen positive through interviews with Team Master Chiefs, have a good reputation, and successfully complete prior leadership positions. This position was incredibly meaningful to me, as I just deployed with these same men and began my career as a Navy SEAL in the same Platoon and Team I was now leading. Serving as one of the Platoon Chiefs of SEAL Team 7 was an honor.

6. To promote from an E-7 to an E-8, I must fulfill a series of requirements, including service in a milestone position. Until the imposition of the COVID-19 requirements I was on track to fulfill those requirements and complete my milestone, therefore becoming eligible to promote to an E-8.

7. When I submitted my Religious Accommodation Request (RAR) in October of 2021, I was removed from that SEAL team and milestone position and sent back to a training command. I was told by my Command Master Chief in December that regardless of whether my religious accommodation request was granted, I could not serve on a SEAL team.

8. Transferring out of that position and back to a training command ended my potential to promote from an E-7 to an E-8. If I remain non-operational because I am unvaccinated, I will be unable to ever attain this promotion.

9. Prior to the COVID-19 vaccine mandate, I consistently received excellent evaluations and awards, including Sailor of the Year for SEAL Team Seven. Therefore, I was

being solicited by a Chief Warrant Officer 4 (W-4) to transition from being an enlisted member of the Navy to an officer for a warrant package through the Warrant Officer Program. I was eligible for this program as an E-7 with fourteen years of dedicated, exemplary service to the Navy and excellent physical qualifications.

10. In support of my warrant package, I received recommendations from Officers, Warrant Officers, and my Commanding Officer. I received this recommendation because I demonstrated outstanding performance as a SEAL, excellent leadership abilities, and the capacity to serve as an Officer of the United States Navy. True and correct copies of my recommendations are attached to this declaration as Exhibit A. After this recommendation, my warrant package was sent to a selection board at Naval Personnel Command.

11. Among those of us seeking warrant packages before the selection board, I screened second in the group for a position, meaning it was incredibly likely that I would be selected. Ultimately, I did not receive a warrant package, even though people that screened below me did. I was told by a CWO3 that my name was removed from consideration because they assumed that I was soon going to be separated from the military because of my RAR. I then received a phone call from a CWO4 explaining how I had frustrated a lot of people that supported my package and that my Commander would not be recommending me any longer. I reached out to the selection board for further clarification about why I was not selected for appointment as a Warrant Officer, but I did not receive a response.

12. There is a prime time for an enlisted sailor to seek appointment as a Warrant Officer, of which I was in. Once an enlisted sailor is appointed as a Warrant Officer, promotion and rank are based on time alone and not on merit or performance. Had I been selected to be a

Warrant Officer, I would likely have retired as a W-4, which would have provided me and my family with substantially higher retirement pay than my current position as an enlisted member.

13. Because I am unvaccinated and non-operational, it would be a near impossibility for me to pursue the Warrant Officer program again or even to promote from an E-7 to an E-8. Since submitting my RAR, I lost time necessary for promotion eligibility, regressed in my skills as a SEAL, and have experienced personal hostility within my command that would make it impossible to prepare another warrant package. Within my community, my reputation is so negatively tarnished for being unvaccinated that I feel as if I have transitioned from an exemplary SEAL to a problem that my leadership and command have no desire to deal with. Therefore, I don't believe I will be able to promote again in my career. There is nothing that I have the power to do that can remedy this loss. Further, there is nothing in my personnel file that the Navy can simply remove to remedy this loss of opportunity.

14. The stigma surrounding my unvaccinated status extends beyond my command and my ability to promote. In March of 2022, I was in need of medical treatment and contacted my hospital corpsman (HMC) to schedule an appointment. A HMC serves as a first step in the process for seeking any sort of medical treatment and is able to approve certain treatments based on his or her initial assessment. I was told by my HMC that he would not approve my requested appointment because I was not vaccinated. I offered to test in advance of any medical appointments, yet my treatment was still not approved. Eventually, I went around the HMC to seek medical care. Although I eventually received the requested appointment, I have lost trust in my ability to receive fair medical treatment because of the stigma surrounding my vaccination status.

15. I am in the process of officially transferring from Temporary Assigned Duty orders at Training Detachment-One (Tradet-1) to Naval Special Warfare Group-One (NSWG-1). NSWG-

I is historically where the Navy sends SEALs with family, character, or performance issues and otherwise is seen as an assignment for those that cause trouble for other commands. I am one of three unvaccinated NSW personnel transferring from Tradet-1 to NSWG-1. Currently, our role in NSWG-1 is complete random tasks assigned to us within the command. I am currently working for a Trident cell that, during the week of February 6, 2023, traveled to a cold weather training trip to Montana that I was not allowed to attend. Instead, I remained at my command and was tasked to move from our old building to a new one a few miles away.

16. I am specifically concerned about my inability to train as a SEAL during the mandate. Because of the highly-specialized nature of Navy SEAL skills, it is nearly impossible to lose two or more years of training opportunities and still maintain the skill level required of a Navy SEAL. Not training prevents me from keeping my skills sharp and at the level my rank and job duties would require.

17. Before the COVID-19 vaccine mandate, my skills were the sharpest they had ever been, and I was teaching skydiving to west coast SEAL Teams and joining other blocks of tactical training. Because I lost so much training time, I do not feel confident that my skills would be sharp enough to lead a SEAL platoon right now, even if I were operational. In a position where I would need to gain the trust and confidence of the men I would lead, I would need to be the tactical subject matter expert. This is the main responsibility of a Platoon Chief. I would need to be refreshed on my skills and new weapon systems before leading junior members of a platoon that are current and up to date. A leader cannot be the weakest link in a platoon. Loss of leadership and skills are quick ways to be fired from a position. These issues and concerns have not changed since the Secretary of Defense rescinded the COVID-19 vaccination mandate on January 10, 2023.

18. I have numerous NSW qualifications which are considered “critical qualifications,” including Master Training Specialist, NSW Sniper, NSW Explosive Breacher, NSW Dive Supervisor, Air Ops Trainer Examiner, Military Freefall Jumpmaster, among others. Each SEAL team and SEAL platoon needs to have a certain number of members with these qualifications to be considered fully mission capable. If I remain non-operational because I am not vaccinated, I am jeopardizing the ability of my team to complete missions.

19. Because I remain unvaccinated, the leadership surrounding me is looking for me to mess up or make a mistake so I can be reprimanded. The repeal of the mandate does not change that.

20. My current status is uncertain to both my command and me. Despite the new Force Health Protection Guidance regarding travel, my command still believes that I cannot travel. When I asked my Senior Chief about travel, he sent me to a website that was last updated on November 30, 2022, and stated that this was the policies that Navy was working off of.

21. One of my most recent tasks assigned is moving laptops from one building to another – a job that my command publicly demeaned. I have also been told that I will be heavy task saturated and closely watched. I believe these tasks will be equally menial to those such as moving buildings and transporting laptops.

22. While I was once a committed naval service member with excellent evaluations, several service awards, and a progressing career, that has been lost because of the mandate. This has caused me and my family many sleepless nights, anxiety, and loss of purpose. My career is suffering and will continue to suffer if my leadership continues to make operational, assignment, and deployment decisions while considering my unvaccinated status. These are the decisions that have already damaged my career, and I expect they will continue based on the Secretary’s January

10, 2023, memo rescinding the mandate but allowing vaccination status to continue to be considered.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on February 12, 2023.

/s/ U.S. Navy SEAL 22
U.S. NAVY SEAL 22

Exhibit A



DEPARTMENT OF THE NAVY

NAVAL SPECIAL WARFARE GROUP ONE
3632 GUADALCANAL ROAD
SAN DIEGO CA 92155-5583

1420
Ser 00/452
22 Sep 21

FIRST ENDORSEMENT on SOC(SEAL) [REDACTED] ltr of 24 Aug 21

From: Commander, Naval Special Warfare Group ONE
To: Commander, Navy Personnel Command (PERS-803)

Subj: APPLICATION FOR CONSIDERATION BY THE FY-23 ACTIVE LIMITED DUTY
OFFICER/CHIEF WARRANT OFFICER IN-SERVICE PROCUREMENT
SELECTION BOARD

Ref: (a) CNO WASHINGTON DC 032039Z JUN 21 (NAVADMIN 116/21)
(b) OPNAVINST 1420.1 (Series)
(c) OPNAVINST 6110.1 (Series)

1. Forwarded. SOC [REDACTED] meets all requirements outlined in references (a) through (c), and is worldwide assignable.
2. I have verified that SOC [REDACTED] meets Personnel Security Information/Clearance Requirements.
 - a. Type of investigation: T3R
 - b. Date of Investigation: 15 May 2019
3. Commanding Officer's Recommendation:
 - a. SOC [REDACTED]'s performance, leadership, and technical expertise, exemplify the traits desired in a SEAL Chief Warrant Officer. He is intelligent, motivated, and demonstrates the highest degree of professionalism. As a member at my Training Detachment his subject matter expertise and dedication as a SEAL instructor has made a positive and lasting impact in my command's operational readiness. The U.S. Navy needs qualified leaders in influential and demanding assignments, and I am sure that SOC [REDACTED]'s experience and drive will make him an asset to any Wardroom in the future. SOC [REDACTED] has my endorsement for the Chief Warrant Officer Program.
4. I certify that the applicant has been provided copies of all enclosures to this application as well as a copy of this endorsement. My command point of contact for this matter is CWO5 Troy Wilson [REDACTED]@socom.mil.


D. A. ABERNATHY

Copy to:
SOC [REDACTED]

INTERVIEWER'S APPRAISAL SHEET

NAVCRUIT 1131/5 (Rev 3-2021)

Supporting Directive: COMNAVCRUITCOMINST 1131.2

(See information on reverse before completing)

TYPE OR PRINT LEGIBLY

Name: SEAL 22	Program for Which Applying: 7151, Chief Warrant Officer	Date: 01 SEP 2021
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PERSONAL QUALITIES

DESCRIPTIVE: Observe the applicant and write 6 adjectives or phrases that you believe to be most descriptive of the applicant:

1. Impressive	2. Relaxed	3. Clear
4. Confident	5. Articulate	6. Combat Proven

INTERVIEWED VIA: Telephone In-Person Other Type of Electronic Media List Type _____

EVALUATIVE: Consider the applicant as a potential Naval Officer and evaluate them on the following:

	*OUTSTANDING	EXCELLENT	GOOD	ADEQUATE	*UNSATISFACTORY						
APPEARANCE AND POISE	X										
ORAL COMMUNICATION AND EXPRESSION OF IDEAS	X										
LEADERSHIP POTENTIAL	X										
YOUR WILLINGNESS TO HAVE INDIVIDUAL SERVE UNDER YOUR COMMAND WHEN COMMISSIONED	PARTICULARLY LIKE TO HAVE		PREFER TO MOST			BE PLEASED TO HAVE		BE SATISFIED WITH		PREFER NOT TO HAVE	
	10	9	8	7	6	5	4	3	2	1	0
	X										

COMMENTS: A summary statement evaluating the applicant is required. All extreme ratings marked by an asterisk (*) should be further commented upon.

THE NUMBER TWO CWO CANDIDATE THAT I HAVE INTERVIEWED THIS YEAR!

SOC **SEAL 22** is an ideal candidate for the NSW CWO program. During his interview he showed confidence and enthusiasm for the CWO program and the challenges of being a NSW CWO. He was very articulate in expressing his knowledge of the NSW CWO community and the commissioning program. He demonstrates all the leadership traits of a veteran SEAL within NSW. I have personally served with him at SEAL Team SEVEN and have observed him in both a training environment and combat deployment. At all times he represented the U.S. and NSW with the highest possible standards.

MOTIVATION

	VERY HIGHLY MOTIVATED FOR PROGRAM	DEFINITELY MOTIVATED FOR PROGRAM	MOTIVATED FOR NAVY - PROGRAM NOT IMPORTANT	MOTIVATED FOR COMMISSION - PROGRAM AND SERVICE NOT IMPORTANT	UNABLE TO DETERMINE
PROGRAM MOTIVATION <small>(Indicate the applicant's motivation for the program for which applying)</small>	X				

POTENTIAL

	OUTSTANDING (1)	EXCELLENT (2)	GOOD (3)	AVERAGE (4)	LESS THAN AVERAGE (5)
TECHNICAL KNOWLEDGE <small>(For LDO/CWO Applicants Only) Refer to Discrete Requirements</small>	X				
POTENTIAL AS A CAREER NAVAL OFFICER	X				

COMMENTS: Supplement or qualify the motivation rating and potential as a career Naval Officer, as appropriate.

SOC **SEAL 22** is truly motivated for the NSW CWO program. He is very motivated to serve in a greater leadership capacity. SOC **SEAL 22** is a dedicated Navy professional with unbounded motivation to lead troops and further the successes of his Naval special warfare community.

SOC **SEAL 22** will immediately increase the effectiveness of any wardroom, I would be honored to serve with this individual at any command when he receives his commission.

I found my replacement, Press 100 NOW!

SIGNATURE OF INTERVIEWER 	TYPE OR PRINT NAME OF INTERVIEWER Ramon Betancourt	GRADE, DESIGNATOR (IF ANY) BRANCH OF SERVICE CWO4/7151/USN
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When Filled In

INTERVIEWER'S APPRAISAL SHEET											
NAVGRUIT 1131/5 (Rev 3-2021)			Supporting Directive: COMNAVGRUITCOMINST 1131.2								
(See information on reverse before completing) TYPE OR PRINT LEGIBLY											
Name: SEAL 22		Program for Which Applying: CWO / Special Warfare Technician (715X)		Date: Sep 2, 2021							
PERSONAL QUALITIES											
DESCRIPTIVE: Observe the applicant and write 6 adjectives or phrases that you believe to be most descriptive of the applicant:											
1. SPEAKS CLEARLY		2. CONFIDENT		3. IMPRESSIVE							
4. WELL-DRESSED		5. POISED		6. ARTICULATE							
INTERVIEWED VIA: Telephone <input type="checkbox"/> In-Person <input checked="" type="checkbox"/> Other Type of Electronic Media <input type="checkbox"/> List Type _____											
EVALUATIVE: Consider the applicant as a potential Naval Officer and evaluate them on the following:											
APPEARANCE AND POISE	*OUTSTANDING	EXCELLENT	GOOD	ADEQUATE	*UNSATISFACTORY						
		X									
ORAL COMMUNICATION AND EXPRESSION OF IDEAS	*OUTSTANDING	EXCELLENT	GOOD	ADEQUATE	*UNSATISFACTORY						
	X										
LEADERSHIP POTENTIAL	*OUTSTANDING	EXCELLENT	GOOD	ADEQUATE	*UNSATISFACTORY						
		X									
YOUR WILLINGNESS TO HAVE INDIVIDUAL SERVE UNDER YOUR COMMAND WHEN COMMISSIONED	PARTICULARLY LIKE TO HAVE		PREFER TO MOST			BE PLEASED TO HAVE	BE SATISFIED WITH		PREFER NOT TO HAVE		
	10	9	8	7	6	5	4	3	2	1	0
			X								
COMMENTS: A summary statement evaluating the applicant is required. All extreme ratings marked by an asterisk (*) should be further commented upon. SOC SEAL 22 possesses the leadership qualities and the technical expertise that the Navy and NSW community desires within their Chief Warrant Officer ranks. His writing ability and communication skills paired with his appearance and poise in uniform make this candidate stand out. His leadership and performance as an enlisted sailor are trademarks and qualities that NSW CWO's must possess. I have no doubt that SOC SEAL 22 will be an outstanding SEAL CWO in the future if selected.											
MOTIVATION											
PROGRAM MOTIVATION <small>(Indicate the applicant's motivation for the program for which applying)</small>	VERY HIGHLY MOTIVATED FOR PROGRAM	DEFINITELY MOTIVATED FOR PROGRAM	MOTIVATED FOR NAVY - PROGRAM NOT IMPORTANT	MOTIVATED FOR COMMISSION - PROGRAM AND SERVICE NOT IMPORTANT	UNABLE TO DETERMINE						
	X										
POTENTIAL											
TECHNICAL KNOWLEDGE <small>(For LDO/CWO Applicants Only) Refer to Discrete Requirements</small>	OUTSTANDING (1)	EXCELLENT (2)	GOOD (3)	AVERAGE (4)	LESS THAN AVERAGE (5)						
		X									
POTENTIAL AS A CAREER NAVAL OFFICER	OUTSTANDING (1)	EXCELLENT (2)	GOOD (3)	AVERAGE (4)	LESS THAN AVERAGE (5)						
		X									
COMMENTS: Supplement or qualify the motivation rating and potential as a career Naval Officer, as appropriate.											
SOC SEAL 22 motivation and commitment for the CWO program were clearly articulated throughout the interview. He has a dynamic understanding of the challenges that the Navy and NSW face in the future. His experience, leadership and performance to date make him an excellent CWO candidate that the Navy and NSW should consider.											
SIGNATURE OF INTERVIEWER WILSON.TROY.EDWARD.116 <small>8859089</small>				TYPE OR PRINT NAME OF INTERVIEWER Troy E. Wilson				GRADE, DESIGNATOR (IF ANY) BRANCH OF SERVICE CW05, 7151, USN			
<small>Digitally signed by WILSON.TROY.EDWARD.1165859089 Date: 2021.09.15 14:09:15 -0700</small>											

CU
When Filled In

INFORMATION FOR COMPLETING INTERVIEWER'S APPRAISAL SHEET

1. The purpose of the interview is to evaluate accurately and impartially the characteristics of the candidate to determine potential as a commissioned officer and motivation toward service in the Navy.
 2. The interview should take a minimum of 15 minutes. A period of 15-30 minutes is usually adequate, although more time may be necessary on occasion.
 3. Discussion topics should draw out the applicant. Suggested topics include: Navy programs, service life, school experiences, personal interests, goals in life, current events, sports, family attitude toward application, and any others suggested by a review of the application file.
 4. Marking is difficult. Your judgments form an important part of each applicant's file, and usually represent the only personal contact with the applicant reported by an official of the Navy. Be fair and impartial, neither too easy nor too hard on the applicant. Mark only on what you have observed personally, not on the opinions or comments of others.
 5. No marks should be put on this form until the interview has been completed.
 6. If it appears that the space for comments will not be sufficient, phrases may be used rather than complete sentences.
 7. Professional interviews are coordinated with the Region Chaplain Field Recruiter and the respective NAVTALACQGRU. **N312** will monitor compliance with the following, before application kits are forwarded to the Chaplain Appointment and Retention Eligibility (CARE) Advisory Group. Cooperation will minimize unnecessary delays in processing applications.
 8. General guidance for ALL NAVCRUIT 1131/5, Chaplain Corps (CHC) Professional Interview Appraisals:
 - a. Should be conducted in-person or using VTC, Facetime, Skype, or similar type technology.
 - b. May only be conducted by an active duty CHC officer in the following rank:
 - (1) CAPT or CAPT(s)
 - (2) CDR (milestone screened only)
 - c. Comment Section Guidance for NAVCRUIT 1131/5: The interviewer will need to address the following areas in the narrative section (additional pages are accepted; typed preferred, legible for fax/photo copies)
 - (1) How has the applicant's previous experience prepared him or her for Navy Chaplaincy?
 - (2) Describe the applicant's understanding of institutional ministry?
 - (3) Comment on the applicant's willingness to facilitate ministry to faith groups other than his or her own?
 - (4) Describe the applicant's disposition toward working with chaplains of faith groups, gender, race other than his or her own?
 - (5) Elaborate on applicant's perception of commission oath and obligations (i.e. extended separations, overseas assignments, shipboard and Fleet Marine Force tours, etc.)
 - (6) Give applicant's response to the fact that some chaplains may only serve three years (Career Status Board) on active duty and may then be release to the inactive reserves. Would the applicant still request appointment in the Navy?
 - (7) Any summary remarks regarding the interviewer's recommendations are also welcome.
- Note: Chaplain Candidate Program Officer (CCPO/1945) applicants may not be well informed regarding the finer nuances of these questions CCPO Orientation addresses these matters, it is not too soon to bring these matters to their attention. CCPO applicant responses will be reviewed in this context, and are not expected to be at the same level as 4100 (active) or 4105 (reserve) applicants.
9. In-person interviews before a CARE Advisory Group is required for all 4100 and 4105 applicants, in addition to the NAVCRUIT 1131/5.
 10. Below is a checklist of characteristics which interviewing officers can observe and adjectives that can be used to describe these characteristics in applicants. This list is meant only to assist the interviewer in preparing the interview and in making a written evaluation afterward. It is not intended to be all-inclusive.

Characteristic/Descriptive-Example Adjectives:

BEARING: Good posture, Stouch, Forceful, Apathetic, Casual, Formal

GROOMING: Careless, Neat, Clean, Unclean, Well-Dressed, Inappropriately dressed

COMPOSURE: Poised, Awkward, Relaxed, Nervous, Confident, Insecure

ATTITUDE: Sincere, Flippant, Enthusiastic, Indifferent, Contentious, Pleasant, Forthright, Secretive, Arrogant, Modest

ORAL EXPRESSION: Articulate, Inarticulate, Responsive, Unresponsive, Taciturn, Loquacious

VOICE QUALITY: Strident, Soft, Spoken, Speaks clearly, Inaudible

GENERAL IMPRESSION: Impressive, Unimpressive, Dull, Interesting, Mature, Immature

When Filled In

INTERVIEWER'S APPRAISAL SHEET							
NAVCUIT 1131/5 (Rev 3-2021)			Supporting Directive: COMNAVCUITCOMINST 1131.2				
(See information on reverse before completing)			TYPE OR PRINT LEGIBLY				
Name: SOC SEAL 22		Program for Which Applying: Warrant Officer		Date: Sep 10, 2021			
PERSONAL QUALITIES							
DESCRIPTIVE: Observe the applicant and write 6 adjectives or phrases that you believe to be most descriptive of the applicant:							
1. Forceful		2. Confident		3. Enthusiastic			
4. Speaks clearly		5. Impressive		6. Forthright			
INTERVIEWED VIA: Telephone <input type="checkbox"/> In-Person <input checked="" type="checkbox"/> Other Type of Electronic Media <input type="checkbox"/> List Type _____							
EVALUATIVE: Consider the applicant as a potential Naval Officer and evaluate them on the following:							
APPEARANCE AND POISE	*OUTSTANDING	EXCELLENT	GOOD	ADEQUATE	*UNSATISFACTORY		
	X						
ORAL COMMUNICATION AND EXPRESSION OF IDEAS	*OUTSTANDING	EXCELLENT	GOOD	ADEQUATE	*UNSATISFACTORY		
		X					
LEADERSHIP POTENTIAL	*OUTSTANDING	EXCELLENT	GOOD	ADEQUATE	*UNSATISFACTORY		
		X					
YOUR WILLINGNESS TO HAVE INDIVIDUAL SERVE UNDER YOUR COMMAND WHEN COMMISSIONED	PARTICULARLY LIKE TO HAVE	PREFER TO MOST			BE PLEASED TO HAVE	BE SATISFIED WITH	PREFER NOT TO HAVE
	10 9	8 7 6	5 4 3	2 1	0		
	X						
COMMENTS: A summary statement evaluating the applicant is required. All extreme ratings marked by an asterisk (*) should be further commented upon.							
SOC SEAL 22 is an accomplished SEAL SOC.							
MOTIVATION							
PROGRAM MOTIVATION <small>(Indicate the applicant's motivation for the program for which applying)</small>	VERY HIGHLY MOTIVATED FOR PROGRAM	DEFINITELY MOTIVATED FOR PROGRAM	MOTIVATED FOR NAVY - PROGRAM NOT IMPORTANT	MOTIVATED FOR COMMISSION - PROGRAM AND SERVICE NOT IMPORTANT	UNABLE TO DETERMINE		
	X						
POTENTIAL							
TECHNICAL KNOWLEDGE <small>(For LDO/CWO Applicants Only) Refer to Discrete Requirements</small>	OUTSTANDING (1)	EXCELLENT (2)	GOOD (3)	AVERAGE (4)	LESS THAN AVERAGE (5)		
	X						
POTENTIAL AS A CAREER NAVAL OFFICER	OUTSTANDING (1)	EXCELLENT (2)	GOOD (3)	AVERAGE (4)	LESS THAN AVERAGE (5)		
		X					
COMMENTS: Supplement or qualify the motivation rating and potential as a career Naval Officer, as appropriate.							
SOC SEAL 22 has demonstrated high performance in NSW.							
SIGNATURE OF INTERVIEWER RATCLIFFE.ALEXANDER.ED WIN.1171627148		TYPE OR PRINT NAME OF INTERVIEWER Ratcliffe, Alexander		GRADE, DESIGNATOR (IF ANY) BRANCH OF SERVICE CDR, SEAL, USN			
Digitally signed by RATCLIFFE.ALEXANDER.EDWIN.1171627148 Date: 2021.09.20 18:28:19 -07'00'							

CU
When Filled In

INFORMATION FOR COMPLETING INTERVIEWER'S APPRAISAL SHEET

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VOICE QUALITY: Strident, Soft, Spoken, Speaks clearly, Inaudible

GENERAL IMPRESSION: Impressive, Unimpressive, Dull, Interesting, Mature, Immature

EXHIBIT 12

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-3; on behalf of themselves and all others similarly situated; **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1**, on behalf of himself and all others similarly situated; **U.S. NAVY SEALs 4-26**; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5**; and **U.S. NAVY DIVERS 1-3**,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, in his official capacity as United States Secretary of the Navy,

Defendants.

Case No. 4:21-cv-01236-O

DECLARATION OF LEVI BEAIRD, LIEUTENANT COMMANDER (SEL), USN

Pursuant to 28 U.S.C. §1746, I, Levi Beaird, declare under penalty of perjury as follows:

1. I am over the age of eighteen and competent to make this declaration.
2. I am a Lieutenant Commander (select) in the United States Navy presently assigned to Surface Warfare Schools Command, a non-operational command, performing the duties of Engineering Instructor.
3. I first joined the Navy in April of 2009 as a pilot select. During Officer Candidate School (“OCS”), I fractured my right tibia and was medically separated in September of 2009.
4. On or about January 2013, I was again selected for Navy OCS and commissioned in October of 2013.

5. After commissioning, I began as a Surface Warfare Officer (“SWO”) working on the *USS Roosevelt*, a guided missile destroyer. Onboard, I was the Electrical Officer and collaterally the Religious Lay Leader. This was my first deployment, which lasted nine months. As the Religious Lay Leader, I was leading five services per week in the absence of chaplains.

6. During my second tour from February 2016 to February 2018, I served as Navigator, Administrative Officer, Electrical Officer, and Training Officer onboard the *USS Devastator*, a mine sweeper out of Manama, Bahrain. I also served as the command’s Religious Lay Leader; however, due to being mostly pier-side, our Sailors had access to base chaplains on a continual basis.

7. In 2017, I committed to serving in the Navy until on or about 2026. As part of that commitment, I screened for Department Head on my first look and was accepted, which is very difficult to accomplish because it is a highly competitive process. I also applied for a Talent Management Selection Board and was selected to attend the Naval Postgraduate School.

8. As part of accepting my offer to attend Naval Postgraduate School, I obligated myself to fulfill the role of a Department Head at sea for three years after graduation from Department Head school and accepted a retention bonus of \$105,000, that would be dispersed incrementally, to do so. The NAVADMIN that applies to my Department Head Retention Bonus is from 2016 and is entirely unrelated to any COVID-19 vaccination guidance.

9. The retention bonus I was awarded has been paid in installments since 2017. To date, I have received six of eight total installments. The last installment I received was in November of 2021. I expected to receive a \$15,000 payment in November of 2022; however, it was withheld for reasons explained below. No one in my chain of command has discussed with me the fact that my bonus payments stopped. The total amount I have received so far is \$75,000.

10. From March 2018 until 2019, I attended the Naval Postgraduate School, Monterey where I received a degree in National Security Studies writing a thesis paper comparing contemporary Russian and Soviet Naval strategy and completed my Joint Professional Military Education at the Navy War College. During my time in postgraduate school, I was the President of the Surface Navy Association, Monterey Bay. In the Surface Warfare community, that's a non-governmental entity that meets for fellowship with a mission of promoting coordination and communication between military professionals with a specific interest in Naval Surface Warfare.

11. After postgraduate school, in October 2019, I was assigned to Commander Amphibious Squadron Eight out of Norfolk, Virginia as the Future Operations Officer. During my deployment with that command from December 2019 through June of 2020, I was primarily responsible for mission and exercise planning.

12. From the time COVID-19 began in March 2020 through May 2020, I was still deployed and located in Bahrain, functioning as a naval liaison officer between Task Force 51.5 and Commander Amphibious Squadron Eight, and moved over 400 personnel to and from ships back to the United States across multiple theaters of operations. My additional duties included delivering meals to personnel who were quarantining coming to and from the United States to our ships and from our ships to the United States, getting care for injured and mentally ill Sailors and Marines, and finding ways to get service members home to their dying loved ones when commercial air routes were non-existent.

13. In May through June of 2020, I traveled to Greece from Bahrain to intercept 21 passengers coming from the United States who needed quarantining before they were taken to their respective ships.

14. I also moved approximately 200 Marines from their ships and quarantined them on base in Greece before sending them to the United States.

15. Although I was constantly exposed, I did not catch COVID-19 until July 2022 and had a very mild case, with symptoms lasting only three days. I have not had COVID-19 since.

16. After my deployment, in June 2020 until August of 2021, the same month the Department of Defense COVID-19 vaccination mandate went into effect, I returned to Norfolk, Virginia and assumed duties as the Staff Administrative Officer, Senior Watch Officer, and Anti-Terrorism Officer. The Senior Watch Officer position is a highly regarded position that is normally reserved for a higher-ranking officer, specifically a post-Department Head O-4, Lieutenant Commander, at the Staff level, but was given to me in my current position as an O-3, Lieutenant.

17. In August of 2021, as part of my commitment to serve in the Navy until 2026, I was transitioned to Department Head School in Newport, Rhode Island where I began my studies in October of that year. I graduated in April of 2022. However, because my Religious Accommodation Request (“RAR”) to not receive the COVID-19 vaccines was denied, my orders to be Chief Engineer, which is a Department Head position, onboard LCS 11 were canceled, **Exhibit A**, and I have since been stashed at the Surface Warfare School Command’s engineering department (N74) as an instructor without a definitive set of orders or an end date in sight.

18. My orders for sea duty onboard LCS 11 were set to begin in December 2022. When I am on sea duty, I receive special duty pay. But since I am presently stashed at a “shore command,” I am not receiving special duty pay.

19. During my time at Department Head School, in November 2021, I submitted my RAR.

20. My RAR was denied in December of 2021, and I submitted my appeal that same month.

21. I received the final denial of my RAR in February of 2022.

22. After receiving my final denial, later in February 2022, I received a Page 13 counseling, a Report of Misconduct, and was given a Notice to Show Cause.

23. After receiving those documents, on March 4, 2022, I attempted to leave my responsive statement package to my Notice to Show Cause with the Director of the Department Head School, as required. The Director was expecting me to hand deliver papers that morning, so, I knocked on the Director's door to his office, said, "Sir . . . hello," and received no response. Then another officer walked into the Director's office and he and the Director had a conversation. I waited outside the Director's office for him and the officer to complete their conversation. When the Director finally walked out, he looked at me and then continued walking past me without saying a word. This is typical of the treatment I have received from senior leadership throughout the course of this litigation.

24. The Notice to Show Cause initiated my Board of Inquiry, which is the Navy's process for discharging Sailors. I had the option to be administratively separated in exchange for an Honorable discharge (for Commission of a Serious Offense) but declined.

25. Thankfully, the Board of Inquiry process was suspended as a result of this Court's issuance of the class-wide preliminary injunction on March 29, 2022. It is only because of this Court's intervention that I have been able to maintain my career in the Navy. However, the injunctive relief does not cure the fact that I could be forced to pay the Navy the bonus monies I already received along with the costs of my post-graduate and Naval War College education.

26. Because I am not vaccinated, I have not been able to become a Department Head, as originally expected when I signed my commitment in 2017, which triggers the Recoupment and Repayment Policy referenced at paragraph 9 of NAVADMIN 206/16.

27. Pursuant to paragraph 5.j. of NAVADMIN 206/16, “Officers who fail to complete DH [(Department Head)] and/or fail to report to their first DH tour will have all payments received recouped as unearned.”

28. Subsequent guidance in NAVADMIN 102/22, which has not been canceled or suspended, states that because I am unvaccinated, my bonus installment payments would end and “become unearned.” This guidance was implemented after class-wide injunctive relief was granted on March 29, 2022.

29. The relevant sections of NAVADMIN 102/22 that apply to me are as follows: “RMKS/1. Purpose. To provide additional guidance regarding the actions directed in references (a) through (h) for Navy service members who requested religious accommodation from the COVID-19 vaccination requirement. These service members were certified by the U.S. District Court order in reference (i) as members of a class action in the case of U.S. Navy SEALS 1-26, et al., versus Secretary of Defense Lloyd J. Austin, III, et al. This message supersedes and replaces guidance previously provided in reference (j).”

30. “2. Policy. To ensure compliance with the court order in reference (i), this NAVADMIN continues to suspend separation processing and certain adverse administrative consequences of COVID-19 vaccine refusal for Navy service members who submitted requests for religious accommodation from the COVID-19 vaccine requirement. In line with a recent decision of the U.S. Supreme Court, the Navy may continue to consider the unvaccinated status of Navy service members when making deployment, assignment, and other operational decisions.”

31. “3. Applicability. This NAVADMIN applies only to Navy service members who have submitted requests for religious accommodation from the COVID-19 vaccine requirement in line with references (k) and (l).”

32. “4.b.3. Bonus, Special Pays, and Incentive Pays. Bonuses, special pays and incentive pays are considered unearned for personnel who have been removed from assignment based on deployment and other operational decisions. Reference (c) [NAVADMIN 256/21, which has not been canceled] provides guidance on required actions for members with unearned bonuses, special pays and incentives.”

33. NAVADMIN 256/21 states at paragraph “8. [that] Bonuses, Special Pays and Incentive Pays. Navy service members refusing the vaccine may not enter into any new agreements for bonuses, special pays, or incentive pays and any unearned portion of current bonuses, special pays and incentive pays will be recouped in accordance with references (r) through (u). Examples include, but are not limited to, the following: career retention bonuses, enlistment bonuses and incentive pays (such as flight pay). Bonuses, special pays and incentive pays become unearned when a Navy service member refusing the vaccine is no longer performing duties for which they are receiving such a bonus, special pay, or incentive pay (i.e. removed from assignment).”

34. NAVADMIN 256/21 further states at paragraph “9.a. [that] Institutional Education. Navy service members refusing the vaccine who incurred a service obligation for an education benefit (e.g. USNA, ROTC, Naval Postgraduate School, Health Professional Scholarship Program or in-residence Professional Military Education), will have any unearned portion of that education benefit recouped if separated before completing the service obligation. Navy service members refusing the vaccine (as defined in para. 3) currently enrolled in such an education program will be dis-enrolled from their program as soon as feasible and held at their institution or command

pending administrative separation. Note: Current USNA and ROTC Midshipmen will be adjudicated by governing instructions as discussed in para. 3.a.”

35. Because vaccination status is still being considered, current Navy policies indicate that I will be required to reimburse the cost of the education received, plus my retention bonus, which amounts to \$75,000 and whatever the Navy determines I owe for studies at Naval Postgraduate School and the Naval War College for Joint Professional Military Education.

36. I have ranked ahead of my peers since I commissioned in 2013 until submission of my RAR.

37. While I was selected in May of 2022 for Lieutenant Commander, O-4, my understanding is that my promotion will be withheld. I have reason to believe that it will be withheld because I have firsthand knowledge of another Lieutenant, selected for Lieutenant Commander, whose promotion is still being withheld as a result of submitting a RAR, despite the mandate being rescinded. Further, I have not received any additional information or guidance from my command or my detailer to suggest otherwise. My command had no idea that I was even selected for Lieutenant Commander and did not celebrate that achievement with me, which is the normal course of action when officers are selected to promote to the next grade.

38. Until the implementation of the August 24, 2021, vaccine mandate, throughout my career, I have been very well-respected and held in high regard among my peers and those in leadership positions.

39. The fact that I will be required to repay my bonus and cost of my postgraduate education is discriminatory, will be damaging to my career and personally financially crippling, and has caused me significant and officially documented anxiety and depression with PTSD-like

symptoms. The cost of repayment will completely wipe out all of my investment accounts and savings, which could further hamper my ability to provide for my wife and four children.

40. As indicated in Secretary of the Navy Carlos Del Toro's speech on December 6, 2022 to the Navy League, the Navy will not allow me and others who are unvaccinated for COVID-19 to return to full operational duty, despite the 2023 National Defense Authorization Act rescinding the COVID-19 vaccination mandate. (<https://news.usni.org/2022/12/07/pentagon-unclear-how-military-would-handle-end-of-mandatory-covid-19-vaccines>). I have done everything in my own power to complete the necessary schools and prepare myself for the job that the Navy will not let me do, which is Department Head.

41. The fact that I cannot become a Department Head is discriminatory and is having a detrimental impact on my entire career, my family's financial security, and our mental wellbeing. If my career continues down this path, I may be forced out of the military and may not promote. I have spent the entirety of my career, up to this point, preparing to become a Department Head. As Navigator, I was a non-billeted Department Head, i.e., a Department Head in practice but not official title. I had all the rights and duties onboard the ship, which my second tour Division Officer counterparts did not. As the Future Operations Officer (N5) and Administrative Officer (N1) at Commander Amphibious Squadron Eight, I was treated as and functioned as a staff Department Head, but like being a Navigator, I was not a billeted Department Head. I had the same duties and responsibilities as my billeted staff Department Head counterparts; however, my time in those positions did not count for me like it did for them.

42. What brings me sufficient anxiety and depression is that I know that if I am unable to ever fulfill the role of Department Head, I will not be able to achieve my next career milestones or take command of a warship, and I will have a heavy financial burden to pay back to the Navy,

plus interest and as to the untaxed amount. When I received my bonuses, I paid taxes on those bonuses. When the Navy claws back those bonuses, my understanding is that they will do so based on the original amount – meaning I will be out even more than what I was paid. I will essentially pay taxes on those sums of money, twice.

43. Like my career initially ended in 2009 due to an injury, I’m afraid that my career has essentially ended again. It is my understanding that if I cannot promote by 2025, I may be faced with meeting a career continuation board. My understanding is that this board convenes to decide whether or not I can stay in the Navy and may eventually lead to my early separation from the Navy because I have not been performing the job that I was trained to do. Because I have 10 more years before retirement, this means that I could lose out on all of my retirement benefits, which includes retirement pay, medical benefits for me and my family, loss of my GI bill education benefits if I receive a general discharge. A general discharge characterization could also have negative collateral impacts beyond the military context.

44. Further, the treatment I have sustained as an unvaccinated member of the Navy has given me enough anxiety and depression that it is now documented in my record, with PTSD-like symptoms. I have been consistently sought after to update Page 13s, be counseled on my RAR, RAR appeal, Report of Misconduct, Notice to Show Cause, and Board of Inquiry. The manner in which I was discriminated against led to my peers constantly questioning what was going on, why I was being targeted, etc.

45. Due to the small size of my family’s base housing, which was supposed to be temporary, half of our belongings are required to be kept in Non-Temporary Storage (“NTS”). For context, my wife and I are currently living in a 1,400 square foot home with four boys. Our NTS has almost converted to be entirely our expense (not the Navy’s) on two occasions because the

Navy will not issue me necessary orders because I am unvaccinated. I have asked my detailer, who is my correspondent with personnel command and is the person who assists with managing my career, a number of times about this and every time he claims it is impossible for me to be issued orders. This has placed further stress on me and my family.

46. Finally, throughout this entire ordeal, neither the Commanding Officer nor Executive Officer of Surface Warfare Schools Command have personally sat down with me to discuss my RAR, my RAR denials, or my RAR appeal. With the exception of signing Page 13s given to me by an O-5 Commander, as a result of the RAR denials, all conversations were delegated to an O-4, Lieutenant Commander, who has no real positional significance in my command. My upper-level leadership continuously demonstrates that I mean nothing to them as a person or a SWO, despite the fact that I have continued to successfully perform my duties, albeit with a tremendously heavy and anxious heart, but while also receiving high remarks from students, peers, and my immediate leadership.

47. At one point during the mandate, I was required to wear stickers on my badge that signified that I was unvaccinated and that I was allowed to enter the building.

48. Although the Secretary of Defense rescinded the COVID-19 vaccination mandate on January 10, 2023, nothing about my above-referenced circumstances has changed. In light of the fact that the Navy will continue to consider my vaccination status for deployment, assignment, and operational decisions, I think that, without court intervention, all of the negative consequences for being unvaccinated, as listed above, will persist.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on February 13, 2023.

/s/ Levi Beaird

LEVI BEAIRD

Exhibit A

R 180207Z MAR 22

FM COMNAVPERSCOM MILLINGTON TN//PERS4128 //

TO SWOSCOLCOM NEWPORT RI//JJJ//

USS SIOUX CITY GOLD//JJJ//

CENNAVAVNTECHTRAU JACKSONVILLE FL//JJJ//

SURFCOMSYSTRNCMD DET SOUTHEAST MAYPORT FL//JJJ//

COMLCSRON TWO MAYPORT FL//JJJ//

PERSUPP DET NAVSTA NORFOLK VA//JJJ//

PERSUPP DET MAYPORT FL//JJJ//

COMLCSRON ONE//JJJ//

COMSURFACEDIV TWO ONE//JJJ//

UNCLAS //N01321//

MSGID/GENADMIN/CHNAVPERS//

SUBJ/BUPERS ORDER//

RMKS/

BUPERS ORDER: 0122 (01) XXX-XX- [REDACTED] (PERS-4128)

OFFICIAL CANCELLATION OF ORDERS FOR

LT LEVI WAYNE BEAIRD, USN

- ORDERS AND ANY MODIFICATIONS(S) THERE TO CANCELLED.

CONTINUE PRESENT DUTY.

(SIGNED)

A. HOLSEY

REAR ADMIRAL, U.S. NAVY

COMMANDER NAVY PERSONNEL COMMAND

PERS413E PERS413 PERS412

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EXHIBIT 13

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-3; on behalf of themselves and all others similarly situated; **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1**, on behalf of himself and all others similarly situated; **U.S. NAVY SEALs 4-26**; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5**; and **U.S. NAVY DIVERS 1-3**,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, in his official capacity as United States Secretary of the Navy,

Defendants.

Case No. 4:21-cv-01236-O

DECLARATION OF FAITH MACK, PETTY OFFICER THIRD CLASS, USN

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I have served in the U.S. Navy since 2017. I reenlisted in 2020 for an additional six years and had previously planned to make my career in the Navy until I earned retirement. I am a Master-at-Arms, which is a Navy law enforcement officer. I am stationed in the Norfolk, Virginia area and assigned to the aircraft carrier USS *Dwight D Eisenhower*.
3. I have a sincere religious objection to receiving the COVID-19 vaccine as mandated by the Navy. In September 2021, I submitted a religious accommodation request. In October 2021, the ship's commanding officer removed anyone who submitted a religious accommodation request from their jobs and titles. On January 6, 2022, the CCDA denied my religious accommodation request. My husband (a

civilian) and I decided not to appeal the denial, as we both could not handle the stress of not knowing whether I would be kicked out of the Navy and I had already been kept from doing my job for months. We decided that it would be better if I just allowed the Navy to separate me, and it seemed that I would be out sooner if I did not appeal. I submitted the paperwork required to start the separation process with PERS-832 on January 7, 2022. On January 28, 2022, my separation package was routed off-ship. The same day, I signed my notice of separation, and I was informed that I should expect to be out of the Navy by February 14, 2022.

4. In reliance on that, my husband and I gave our landlord 30 days' notice and moved out of our apartment at the end of February. My husband went to stay with my parents in New York. Because I could not leave the area, I moved onto the berthing barge for the *Eisenhower*.

5. The conditions on the barge are deplorable, much like the USS *George Washington*, which is anchored in the same shipyard.¹ There is mold everywhere and the barge's toilets back up (*see* Exhibit A) and leak (*see* Exhibit B). The water leaks out of the base of the toilet and collects near my rack and out into the hall. On bad days, it goes into the berthings on the other side. The leaks seem to be sewage—it smells like sewage and looks like it too. *See* Exhibit C (water I've mopped up from under my rack). There is some sort of worm thriving in the stagnant water in the toilet bowls and on the floor in the leaked water around the base of the toilets. *See* Exhibit D.

6. Needless to say, I do not feel comfortable or safe in this environment and I have contacted mental health services multiple times.

7. There are nine other individuals in my department who submitted religious accommodation requests. One of those individuals, Jesse Flores, is a Logistics Specialist (LS1). He bought a new home for his family in Texas believing the Navy's representations that he would be

¹ *See* "Report: Hundreds of USS *George Washington* sailors living aboard ship to be moved off," *Navy Times*, May 2, 2022, <https://www.navytimes.com/news/your-navy/2022/05/02/report-hundreds-of-uss-george-washington-sailors-living-aboard-ship-to-be-moved-off/>; Konstantin Toropin, "Hundreds of Sailors Being Moved Off Carrier After Surge of Suicides, Captain Tells Crew," *Military Times*, Apr. 29, 2022, <https://www.military.com/daily-news/2022/04/29/hundreds-of-sailors-being-moved-off-carrier-after-surge-of-suicides-captain-tells-crew.html>.

separated soon. He has been living on the same berthing as me in similar conditions. Waiting to be separated with no end in sight has been extremely hard and has made it impossible to try to make plans for jobs or homes after we leave the Navy.

8. My husband recently suffered a work-related injury and has lost almost all vision in his left eye. He may not be able to work and I need to be able to be with him to help.

9. Sometime in April, we were told by the Navy that we would not be able to separate due to the class action. In May, I asked if I could be separated if I withdrew my religious accommodation request and I was told that I could not do that.

10. Thus, I have not withdrawn my request. I do want—desperately—to be separated from the Navy as soon as possible, but I struggle with withdrawing my request as I feel it could signal that my religious objection was somehow not genuine, and it is. It feels wrong to have to renounce my beliefs in order to get the Navy to separate me.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on June 8, 2022.

/s/ Faith Mack
Faith Mack

Exhibit A



Exhibit B



Exhibit C



Exhibit D







EXHIBIT 14

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BRYAN P. SPENCE, *et al.*,

Plaintiffs,

v.

LLOYD J. AUSTIN, III, *et al.*,

Defendants.

Case No: 4:22-cv-00453

DECLARATION OF LIEUTENANT COLONEL MICHAEL B. MCCOY

Pursuant to 28 U.S.C. §1746, I, Lieutenant Colonel Michael B. McCoy, under penalty of perjury, declare as follows:

1. I am over the age of eighteen and am competent to make this declaration.
2. I presently reside in Colbert, Washington.
3. I served as a Department of the Air Force (“Air Force”) active-duty service member from May 18, 2003 to November 26, 2014 and as an Air Force Reserve service member from November 26, 2014 to the present.
4. I am presently assigned to the 5th Flying Training Squadron, 340th Flying Training Group at Vance Air Force Base (AFB) in Enid, Oklahoma where my job title is Assistant Flight Commander/T-38 Instructor Pilot. I have been assigned to this unit since November 1, 2020. I was previously assigned to the 97th Flying Training Squadron at Sheppard AFB, which is also part of the 340th Flying Training Group from November 26, 2014 to October 31, 2020.
5. As an Assistant Flight Commander, my duties include assisting the Flight Commander with managing the T-38 Flight, which is comprised of approximately 12 other Instructor Pilots (IPs). I write travel orders for the Flight, ensure that everyone is paid for work performed, and process the other IPs’ travel vouchers.
6. As a T-38 IP, my duties include maintaining my own proficiency in flying the T-38 and teaching the next generation of future fighter and bomber pilots. The T-38 is a two-seat fighter-type aircraft. When I instruct students in the aircraft, I sit in the rear cockpit and a student sits in the front cockpit. Flight instruction includes a pre-flight briefing and a post-flight debriefing that takes place in person, without masking or social distancing.
7. When I am on orders, my duties also include attending weekly Squadron Leadership meetings in person, without masking or social distancing.
8. On October 14, 2021, I submitted a Religious Accommodation Request (“RAR”) to be exempted from the COVID-19 vaccine requirement. On January 7, 2022, I received the initial denial of my RAR from Headquarters Air Force Reserve Command. On January

12, 2022, I submitted my appeal to the Department of the Air Force Surgeon General. On April 15, 2022, my RAR appeal was ultimately denied. The reasons cited for the denial were mission readiness and that no lesser accommodation in existence.

9. On May 18, 2022, I was granted a medical exemption to the Air Force's COVID-19 vaccine requirement. I have been granted that exemption until at least June 21, 2023.
10. With my medical exemption in place, I am able to work, fly, and earn pay and points in my normal role as a traditional reservist and T-38 IP. In other words, I can perform all of my assigned duties that I would otherwise perform if I was vaccinated. The only restriction placed on me due to my unvaccinated status is that I am not allowed to go on Temporary Duty orders away from Vance AFB. This means that while I can fly missions domestically and perform all the duties of an IP, I am not permitted to stay overnight anywhere other than Vance AFB when I am on orders. This restriction on travel policy is in place for unvaccinated service members across the Air Force. However, I am allowed to travel to Vance AFB from my home in Colbert, WA to perform my duties as an IP and Assistant Flight Commander at the Air Force's expense.
11. There is another IP in my squadron at Vance AFB who also has a COVID-19 vaccine medical exemption and is also allowed to work and fly in accordance with her regular duties.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 23, 2022.



Michael B. McCoy

Signature Certificate

Reference number: XVYV3-WEU4P-XUCHX-3PDZM

Signer	Timestamp	Signature
Mike McCoy Email: [REDACTED]		
Sent:	23 Jun 2022 16:27:12 UTC	
Viewed:	23 Jun 2022 16:34:48 UTC	
Signed:	23 Jun 2022 18:55:40 UTC	
Recipient Verification:		IP address: [REDACTED]
✓Email verified	23 Jun 2022 16:34:48 UTC	Location: Little Rock, United States

Document completed by all parties on:
23 Jun 2022 18:55:40 UTC

Page 1 of 1



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S.App.31

EXHIBIT 15

HACKERSTEPHENS_{LLP}

HEATHER GEBELIN HACKER
Partner

(512) 399-3022
Heather@HackerStephens.com

September 13, 2022

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Via ECF

Re: *U.S. Navy SEALs 1-26 v. Biden*, No. 22-10077 consolidated with 22-10534

Dear Mr. Cayce,

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellees submit additional authority and newly discovered facts that counsel just became aware of this morning.¹ On June 2, 2022, the Department of Defense Acting Inspector General (DoDIG) sent a memo to the Secretary of Defense to inform him “of potential noncompliance with standards for reviewing and documenting the denial of religious accommodation requests of Service members identified through complaints submitted to [DoDIG]” regarding DoD’s handling of religious accommodation requests pertaining to the COVID-19 vaccine mandate. Among DoDIG’s findings, which undermine Defendants-Appellants’ arguments in this appeal:

- There is a “trend of generalized assessments rather than the individualized assessment that is required by Federal law and DoD and Military Service policies.”
- The denial memorandums reviewed “did not reflect an individualized analysis demonstrating that the Senior Military Official considered the full range of facts and circumstances relevant to the particular religious accommodation request.”

¹ See *DoDIG memo to SECDEF highlights deliberate violation of Federal Law within the DoD*, Terminal X (Sept. 13, 2022), <https://trmlx.com/dodig-memo-to-secdef-highlights-deliberate-violation-of-federal-law-within-the-dod/>.

U.S. Navy SEALs 1-26 v. Biden, No. 22-10077 consolidated with 22-10534
Page 2

- The “volume and rate at which decisions were made to deny requests is concerning. . . . Assuming a 10-hour work day with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.”

A copy of the memo is attached.

Respectfully submitted,

/s/Heather Gebelin Hacker
Heather Gebelin Hacker
Counsel for Plaintiffs-Appellees

Encl: Info Memo from DoD Acting Inspector General Sean W. O'Donnell to Defense Secretary Lloyd Austin

cc: All counsel of record via ECF

CUI

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

SEP - 2 2022



MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND
READINESS

SUBJECT: Referral of Info Memo from the Office of Inspector General Regarding Coronavirus
Disease 2019 Religious Accommodation Requests

Mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and ensure its readiness to defend the American people. Uniform standards must be applied to all requests for medical or administrative exemption in a manner consistent with the law and DoD policy, including DoD Instruction 6205.02, "DoD Immunization Program," and DoD Instruction 1300.17, "Religious Liberty in the Military Services."

The DoD Office of Inspector General transmitted the attached Info Memo regarding information it received and reviewed concerning denials of religious accommodation requests from COVID-19 vaccination requirements. I am referring the Info Memo to you for appropriate action, in coordination with the Secretaries of the Military Departments and the DoD Office of General Counsel, as necessary and appropriate.

Attachment:
As stated

cc:
Secretaries of the Military Departments
General Counsel of the DoD
Acting Inspector General of DoD



OSD005557-22/CMD007059-22

Controlled by: DoD OIG
Controlled by: Administrative Investigations
CUI Categories: PRIIG/INV/WHSTL
Limited Dissemination Control: FEDCON
POC: Marguerite Garrison 703-604-8500

CUI

CUI

20220601/1440



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500

INFO MEMO

June 02, 2022

FOR: SECRETARY OF DEFENSE

DepSecDef Action _____

FROM: Sean W. O'Donnell, Acting Inspector General *Sean W O'Donnell*

SUBJECT: Denials of Religious Accommodation Requests Regarding Coronavirus Disease-2019 Vaccination Exemptions

- **Purpose.** To inform you of potential noncompliance with standards for reviewing and documenting the denial of religious accommodation requests of Service members identified through complaints submitted to my office.
- The Department of Defense (DoD) Hotline received dozens of complaints regarding denied religious accommodation requests from Service members. We found a trend of generalized assessments rather than the individualized assessment that is required by Federal law and DoD and Military Service policies.¹
- The denial memorandums we reviewed generally did not reflect an individualized analysis, demonstrating that the Senior Military Official considered the full range of facts and circumstances relevant to the particular religious accommodation request. For example, an Air Force general denied one Airman's request with the brief statement: "I disapprove your request for exemption from vaccinations under the provisions of AFI 48-110, paragraph 2-6.b.3."

¹ The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b). The U.S. Supreme Court has clarified that RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726-27 (2014) (citation omitted).

DoD Instruction 1300.17, "Religious Liberty in the Military Services," paragraph 3.2.d. ., requires that "[o]fficials charged with making recommendations or taking final action on a Service member's request for the accommodation of religious practices will review each request individually, considering the full range of facts and circumstances relevant to the specific request.... The means that is least restrictive to the requestor's religious practice and that does not impede a compelling governmental interest will be determinative." [Emphasis added.]

Prepared By: John Fazakerley, SA to DIG AI
Phone Number: 703-604 8764

Controlled by: DoD OIG
Controlled by: Administrative Investigations
CUI Category: PRIIG/INV/WHSTL
Limited Dissemination Control: FEDCON
POC: Marguerite Garrison 703-604-8500

CUI



OSD004843-22/CMD006126-22

- We also reviewed appellate authority decisions that overturned denials of religious accommodation requests. Some of the appellate decisions included documentation that demonstrated a greater consideration of facts and circumstances involved in a request.
- Additionally, the volume and rate at which decisions were made to deny requests is concerning. The appeal authorities of the Services we reviewed indicated that an average of 50 denials per day were processed over a 90-day period. Assuming a 10-hour work day with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.
- We bring this to your attention for any action you deem appropriate to ensure that published guidance, including DoD Instruction 1300.17, "Religious Liberty in the Military Services," are followed when acting on requests for religious exemption from coronavirus disease-2019 (COVID-19) vaccination requirements. We will make available to the DoD General Counsel the complaints received by the Hotline that support our comments.
- Finally, we want to remind you of our recently announced Audit of Military Departments' Processing of Coronavirus Disease-2019 Vaccination Exemptions and Disciplinary Actions for Active Duty Service Members (Project No. D2022-D000AW-0081.000). The objective of this audit is to determine whether the Military Departments are processing exemption requests for the COVID-19 vaccination and taking disciplinary actions for active duty Service members in accordance with Federal and DoD guidance.
- If you have any questions, please contact me at 703-604-8300 or Marguerite Garrison, Deputy Inspector General for Administrative Investigations at 703-604-8500, or marguerite.garrison@dodig.mil. If you wish to discuss the specifics of the ongoing audit, please contact Brett Mansfield, Deputy Inspector General for Audit at 703-604-8900, or brett.mansfield@dodig.mil.

cc:

General Counsel of the Department of Defense

EXHIBIT 16

HACKERSTEPHENS^{LLP}

HEATHER GEBELIN HACKER
Partner

(512) 399-3022
Heather@HackerStephens.com

December 5, 2022

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Via ECF

Re: *U.S. Navy SEALs 1-26 v. Biden*, No. 22-10077 consolidated with 22-10534

Dear Mr. Cayce,

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellees submit newly discovered facts and additional authority. As explained in Plaintiffs' briefing, the appeals for numerous class members are still being processed by the Navy. As part of this process, commanding officers have the option to submit endorsements in favor of an appeal. Attached is an endorsement from a Navy Commander urging the Navy to approve SWCC 3's religious accommodation request, which was received by SWCC 3 on November 16, 2022. In analyzing the Navy's asserted compelling interests, the Commander concludes no such compelling interest exists when SWCC 3's age, fitness, and medical history is considered alongside the marginal benefit of the vaccine to protect individuals against the Omicron variant of the virus, which now accounts for most COVID-19 infections. The Commander also concludes that the mandate is not the least restrictive means of accomplishing the Navy's interest because natural immunity, masking, and good hygiene are less restrictive alternatives. Indeed, according to the Commander, enforcing the mandate will result in the loss of personnel necessary for accomplishing the Commander's mission. This endorsement further illustrates that the Navy has failed to satisfy RFRA's rigorous standard.

Counsel also points the Court to the recent decision in *Doster v. Kendall*, No. 22-3497/3702, 2022 WL 17261374 (6th Cir. Nov. 29, 2022). In *Doster*, a unanimous panel of the Sixth Circuit upheld preliminary injunctions for both individual Air Force servicemembers and a class of Air Force servicemembers. The court determined that abstention is inappropriate, the action is ripe for judicial review, the

U.S. Navy SEALs 1-26 v. Biden, No. 22-10077 consolidated with 22-10534
Page 2

servicemembers are likely to succeed on the merits of their RFRA claims, and that the other requirements for injunctive relief are met. The Sixth Circuit noted that the Air Force (like the Navy here) asked it “to read RFRA as if it simply codified the ‘great deference’ that the Supreme Court had previously given to the military under the Free Exercise Clause. . . . We see no textual path to that result.” *Id.* at *19 (citations omitted).

Sincerely,

/s/Heather Gebelin Hacker

Heather Gebelin Hacker

Counsel for Plaintiffs-Appellees

Encl: Endorsement

cc: All counsel of record via ECF



DEPARTMENT OF THE NAVY
NAVAL SPECIAL WARFARE GROUP ELEVEN
3322 GUADALCANAL ROAD BUILDING 309
SAN DIEGO CA 92155-5094

1732
Ser N00/105
5 Oct 22

SECOND ENDORSEMENT on **SWCC 3**

From: Commander, Naval Special Warfare Group ELEVEN
To: Chief of Naval Operations
Via: Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) (N1)

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

- Ref:
- (a) 42 U.S.C 2000bb-1
 - (b) ALNAV 062/21
 - (c) "Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems," Centers for Disease Control and Prevention, 11 August 2022
 - (d) Bardosh, Kevin, et al, "COVID-19 Vaccine Boosters for Young Adults: A Risk Benefit Assessment and Five Ethical Arguments against Mandates at Universities," SSRN, 12 September 2022
 - (e) Stein, Rob, "Scientists debate how lethal COVID is. Some say it's now less risk than flu," *National Public Radio*, 16 September 2022
 - (f) LCDR Ruth Link-Gelles, "Updates on COVID-19 Vaccine Effectiveness during Omicron," Centers for Disease Control and Prevention, 1 September 2022
 - (g) BUMED ltr 6320 Ser M44/21UM401 of 22 Sep 21
 - (h) BUMED ltr 6320 Ser M44/21UM42355 of 10 Nov 21
 - (i) BUMED ltr 6320 Ser M44/22UM401 of 15 Jun 22
 - (j) "COVID-19 Situation Update: COVID-19 Vaccine Breakthrough Data," Minnesota Department of Health
 - (k) "Weekly Epidemiology and Surveillance Report," Oklahoma State Department of Health, 26 June – 2 July 2022
 - (l) "Rhode Island COVID-19 Breakthrough Data," Rhode Island Department of Health
 - (m) "COVID-19 Data" dashboard, Utah Department of Health & Human Services
 - (n) "Quarterly COVID-19 Update: Hospitalizations, Deaths, Repeat, and Vaccine Breakthrough Infections," The Section of Epidemiology, Alaska Division of Public Health, March 2022
 - (o) "South Dakota COVID-19 Dashboard," South Dakota Department of Health, June 2022.
 - (p) "Estimated COVID-19 Burden," Centers for Disease Control and Prevention, 12 August 2022
 - (q) Sharff, Katie A., et al, "Risk of myopericarditis following COVID-19 mRNA vaccination in a large integrated health system: A comparison of completeness and

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

- timeliness of two methods,” *Pharmacoepidemiology and Drug Safety*, 16 April 2022
- (r) Buchan, Sarah A., et al, “Epidemiology of Myocarditis and Pericarditis Following mRNA Vaccination by Vaccine Product, Schedule, and Interdose Interval Among Adolescents and Adults in Ontario, Canada,” *JAMA Network Open*, 24 June 2022
 - (s) Dr. Guy Witberg, et al., “Myocarditis after Covid-19 Vaccination in a Large Health Care Organization,” *New England Journal of Medicine*, 21 December 2021
 - (t) Patone, Martina, et al, “Risk of Myocarditis After Sequential Doses of COVID-19 Vaccine and SARS-CoV-2 Infection by Age and Sex,” *Circulation*, 22 August 2022
 - (u) Dr. Dror Mevorach, et al, “Myocarditis after BNT162b2 mRNA Vaccine against Covid-19 in Israel,” *New England Journal of Medicine*, 2 December 2021
 - (v) “COVID-19 infection poses higher risk for myocarditis than vaccines,” *American Heart Association News*, 22 August 2022
 - (w) Diaz, George A., et al, “Myocarditis and Pericarditis After Vaccination for COVID 19,” *JAMA Network*, 4 August 2021
 - (x) Fraiman, Joseph, et al, “Serious adverse events of special interest following mRNA COVID-19 vaccination in randomized trials in adults,” *Science Direct*, 22 September 22
 - (y) Under Secretary of Defense for Personnel and Readiness (USD(PR)) Memo, Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance
 - (z) NAVADMIN 130/22
 - (aa) Leon, Tomas M., et al, “COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis – California and New York, May – November 2021,” *Morbidity and Mortality Weekly Report*, Centers for Disease Control and Prevention, 28 January 2022
 - (bb) Dr. Kristie E. Clarke, et al, “Seroprevalence of Infection-Induced SARS-CoV-2 Antibodies – United States, September 2021-February 2022,” *Morbidity and Mortality Weekly Report*, Centers for Disease Control and Prevention, 26 April 2022
 - (cc) Pilz, Stefan, et al, “SARS-CoV-2 reinfections: Overview of efficacy and duration of natural and hybrid immunity,” *Environmental Research*, June 2022
 - (dd) Wei, Jia, et al, “Antibody responses and correlates of protection in the general population after two doses of the ChAdOx1 or BNT162b2 vaccines,” *Nature Medicine*, 14 February 2022
 - (ee) Nordström, Peter, et al, “Risk of SARS-CoV-2 reinfection and COVID-19 hospitalisation in individuals with natural and hybrid immunity: a retrospective, total population cohort study in Sweden,” *The Lancet: Infectious Diseases*, 31 March 2022
 - (ff) Dr. Paul A. Offit, “Covid-19 Boosters – Where from Here?,” *New England Journal of Medicine*, 28 April 2022
 - (gg) Dr. Heba N. Altarawneh, et al, “Effects of Previous Infection and Vaccination on Symptomatic Omicron Infections,” *New England Journal of Medicine*, 7 July 2022
 - (hh) Al-Aly, Zihad, et al, “Long COVID after breakthrough SARS-CoV-2 infection,” *Nature Medicine*, 25 May 2022.

Encl: (1) Religious Accommodations Step-by-Step Instructions
(2) NSWG-11 COVID-19 Infection Tracker
(3) Israel: Coronavirus Pandemic Country Profile

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

- (4) Iceland: Coronavirus Pandemic Country Profile
- (5) Nyberg, Tommy, et al, "Comparative analysis of the risks of hospitalization and death associated with SARS-CoV-2 omicron (B.1.1.529) and delta (B.1.617.2) variants in England: (a cohort study)," *The Lancet*, 16 Mar 2022
- (6) Appendices to Enclosure (5)
- (7) Adjei, Stacey, et al, "Mortality Risk Among Patients Hospitalized Primarily for COVID-19 During the Omicron and Delta Variant Pandemic Periods – United States, April 2020 – June 2022," Centers for Disease Control and Prevention, 16 September 2022
- (8) "Risk for COVID-19 Infection, Hospitalization, and Death by Age Group," Centers For Disease Control and Prevention, 16 September 2022.
- (9) Email from Matthew J. Wallock, dtd 2 August 2022
- (10) Idaho COVID-19 Events by Vaccination Schedule
- (11) Kentucky COVID-19 Data by Vaccination Schedule
- (12) Vermont COVID-19 Breakthrough Data
- (13) Mississippi Vaccination Report
- (14) Louisiana COVID-19 Dashboard Snapshot
- (15) NSW RC Retention Survey Results, August 2022
- (16) Dr. Sivan Gazit, et al, "Comparing SARS-CoV-2 Natural Immunity to Vaccine Induced Immunity: Reinfections Versus Breakthrough Infections"
- (17) Kuldorff, Martin, "A Review and Autopsy of Two COVID Immunity Studies," 2 November 2021
- (18) Centers for Disease Control and Prevention (CDC) Letter dtd 05 Nov 2021

1. **Executive Summary:** I acknowledge up front the length of this endorsement. This is owed to several reasons:

a. This is **SWCC 3**'s final administrative opportunity for accommodation of his religious beliefs, and I believe it is my responsibility to comprehensively and accurately address this matter.

b. The law requires a good faith, case-by-case review.

c. My force, the Naval Special Warfare Reserve Component, is grappling with retention challenges due in part to the manner in which religious accommodation requests like that from **SWCC 3** have thus far been processed and adjudicated by the Navy. For mission-related reasons subsequently discussed, I cannot afford to lose more quality Sailors.

I take no comfort in my role in this process, which effectively places me between well-intentioned Navy and DoD policies addressing unvaccinated Sailors and the duly enacted law of the land that outlines a standard which, when applied in **SWCC 3**'s *specific* case, dictates an outcome contrary to that contemplated by the Navy's more generalized policies. I believe my role in this process is twofold: 1) to carry out Navy policy and the orders of those above me; and, 2) to honestly apply the law – the Religious Freedom Restoration Act (RFRA) – to the specific facts on the ground and, as the NSW commander closest to this Sailor, his unit, and the operational requirements he is needed to fill, to candidly communicate my ground-level observations. I do not take this role – nor my charge of command and oath – lightly, and I hope

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

this lengthy, cumbersome document – which has been staffed, re-staffed, and then staffed some more – evidences the seriousness with which I approach this matter. Further, I sincerely hope the forthcoming analysis and ground-level detail on **SWCC 3**, his unit, my force, and my manning challenges illuminates a path to reconcile our considerable efforts to foster a diverse and inclusive force with our interests to protect the health and safety of that force.

2. **Standard of Review:** I initially reviewed and endorsed **SWCC 3**'s request for religious accommodation on 15 December 2021. I carefully applied the guidance in the Religious Freedom Restoration Act (RFRA) and implementing DOD, SECNAV, and BUPERS instructions, which led to the conclusion that approval of his request was justified by both fact and law. Now, reviewing **SWCC 3**'s appeal with nine months' worth of additional data and observations to inform my decision-making and recommendations, the grounds justifying approval of his religious exemption request are even stronger. To be clear, I have personally recommended that all my teammates, including **SWCC 3**, get one of the COVID shots. Alas, my personal preferences must subordinate to the Constitution – to which I have repeatedly sworn an oath – and must acquiesce to the duly-enacted laws of the nation, passed by Congress and signed by the President. In **SWCC 3**'s case, the governing law is RFRA, passed with bipartisan support in the House and then by a 97-3 vote in the Senate before being signed into law by President Clinton in November 1993. Drafted and passed with the express purpose of bolstering the Constitution's protections of the Free Exercise of religion against government intrusions¹, this unambiguous and purposefully-crafted statute places the burden of proof *on the government* – defined to encompass every “branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States” – when government action or mandate substantially burdens a citizen's First Amendment rights to free religious exercise. RFRA forbids any substantial government burden on an individual's Free Exercise unless *the government* “demonstrates” the substantial burden it's imposing (1) “is in furtherance of a compelling government interest” and (2) “is the least restrictive means of furthering that compelling government interest.” Underscoring that the burden of proof rests on the government, not the individual, RFRA defines “demonstrates” as “meets the burdens of going forward with the evidence and of persuasion.”

3. Case law further underscores that the government's charge under RFRA is considerable, and the bar it must clear to substantially burden an individual's free exercise rights is high. As the Supreme Court has reiterated, RFRA affords even “greater protection for religious exercise than is available under the First Amendment” and provides that the “Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). Once an individual entitled to the protections of RFRA – as **SWCC 3** unquestionably is – demonstrates a substantial burden on his exercise of religion – as he unquestionably has – “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’ – the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzales v. O*

¹ Expressly-stated in the statute, reference (a), RFRA is intended “(1) to restore the compelling interest test... in all cases where free exercise of religion is substantially burdened[] and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430-431 (2006). By focusing on “the burden to the person,” RFRA’s burden of proof requires the government justify its action or policies burdening Free Exercise not with generalizations and conclusory statements about its compelling interests or about, broadly, the absence of less restrictive means to further those interests. “RFRA demands a ‘more focused’ inquiry and requires scrutiny of the ‘marginal interest in enforcing’ the challenged government action in that particular context. *Colonel Financial Management Officer v. Austin*, 8:22-CV-1275-SDM-TGW (M.D. Fla. Aug. 18, 2022) (citing *Holt*, 574 U.S. at 363 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014))). Applying the court’s admonition from an ongoing case concerning the Marine Corp’s discharge of its RFRA obligations to the present matter, “RFRA requires in practice that the [Navy] articulate – that is, display for informed review – the [Navy’s] calculation of the extent of the adverse effect on the health and readiness of the force that results from allowing a *particular* [Sailor] to faithfully observe the [Sailor]’s sincere religious belief while serving any reasonable health and safety practice the [Navy] might prescribe and explain why incurring that marginal adverse effect unacceptably impairs some compelling governmental interest.” *Colonel Financial Management Officer v. Austin*, 8:22-CV-1275-SDM-TGW (M.D. Fla. Aug. 18, 2022) (emphasis mine).

4. While I *personally* disagree with **SWCC 3**’s calculus on the SARS-CoV-2 shots and while I do not fully understand all of his religious beliefs, I respect them and their constitutional protection. Furthermore, I have no reason to question the veracity and deep-seated nature of **SWCC 3**’s religious convictions nor the religious grounding of his objection to compelled inoculation, noting simply that a respected military chaplain supporting **SWCC 3** has assessed and confirmed the religious sincerity of his objection. As such, the ensuing question is whether the Navy’s requirement that **SWCC 3** receive an approved COVID-19 pharmaceutical intervention *substantially burdens* his First Amendment rights to free exercise of his Christian faith. The government burdens the free exercise of religion when it “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Thomas v. Rev. Bd. Of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981). Indeed, substantial burden is “inescapable [where the] law affirmatively compels [an individual], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs,” *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), where the government forced an individual to choose between their job and their religious beliefs, *see Sherbert v. Verner*, 374 U.S. 398, 404 (1963), and, where an individual is “coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008). “Of course, the injection into the body of a substance against which **SWCC 3** harbors a sincere religious objection...burdens Free Exercise. And the burden is substantial...because the order to accept injection of the vaccine forces [him] to choose between betraying a sincere religious conviction and suffering court martial or separation from the military” along with an array of collateral consequences including, but not limited to, severance of his and his family’s entitlement to valuable medical benefits and of the opportunity to realize a retirement pension. *Colonel Financial Management Officer* at 33-34.

5. Because the choice forced upon **SWCC 3** – to violate his sincerely held religious convictions or surrender his career as a Navy Reservist along with its accompanying entitlements – substantially burdens his religious exercise, the government must demonstrate that placing this burden on **SWCC 3** both furthers a compelling government interest and does so by the least

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

restrictive means. Before addressing whether these tests are satisfied “to the person” of **SWCC 3** specifically, I would be remiss to not address the manner in which the Navy, generally, has processed not just **SWCC 3**’s religious accommodation request but, by all indications, those of the over 40 service members supporting my claimancy who similarly sought the protection of RFRA and petitioned for accommodation of their Free Exercise rights. Whereas an “individualized assessment” of each religious accommodation applicant is required in discharging the compelling interest and least-restrictive means tests, the Chief of Naval Personnel (CNP) has, per public reports, denied every one of the thousands of religiously-based exemption requests of Navy service members, apparently while utilizing a SOP (enclosure (1)) that directed creation of a *disapproval* letter draft before a servicemember’s request was even read. I recognize the difficulty of the task faced by the Chief of Naval Personnel (CNP) and subordinate Religious Accommodations staff, which I have to assume was not staffed as necessary to process *thousands* of requests, such as **SWCC 3**’s. I understand the time-intensity and nuance required to afford each and every request the individualized examination and good faith analysis required by RFRA – and to make an individualized, fact-based assessment of “not whether [the Navy has] a compelling interest in enforcing its [vaccination] policies generally, but whether it has such an interest in denying an exception to [each individual Sailor, like **SWCC 3** who made an actionable request].” *Fulton*, 141 S. Ct. at 1881. But, that is what the law – and our own implementing instructions – requires. As recently as 2020, Justice Alito emphasized that the government has a “high bar” to clear in RFRA cases. The Supreme Court and federal appellate courts have repeatedly emphasized that the bar is raised even higher “[w]here a regulation already provides an exception from the law for a particular group[.]” *McAllen Grace Brethern Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (citations omitted); *see also Fulton v. City of Phila.*, 141 S. Ct. 1868, 1878-83. I fear that is precisely the situation at play here, where the Navy has granted hundreds of temporary or permanent medical exemptions – and exempted, at least temporarily, those who participated in clinical trials, even those in the control group – while summarily denying those petitioners seeking accommodation under the First Amendment and RFRA.

6. Having established that the Navy’s requirement to receive an FDA-approved SARS-CoV-2 pharmaceutical intervention substantially burdens **SWCC 3**’s First Amendment rights to free exercise of religion, we must next ask whether enforcing this requirement, *against SWCC 3 specifically*, furthers a compelling government interest. Although not explicitly defined in this context, “compelling” has often been described as “essential” or “necessary” rather than a matter of choice, preference, or discretion. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be ‘necessary...to the accomplishment’ of their legitimate purpose,” *citing McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).) (In the context of the Free Exercise of religion, the Court in *Wisconsin v. Yoder* allowed Amish parents to withdraw their children from school at age fourteen, despite the state requiring school attendance until sixteen, finding that the state’s interest in an additional two years of education, and the benefits therefrom, was not compelling enough to burden the free practice of religion. 406 U.S. 205 (1972).)

7. Since the emergence of COVID-19 in 2020 and the 2021 mandate (reference (b)) that all Sailors “be fully vaccinated...with an FDA approved vaccination against COVID-19,” Senior Navy officials have, as justification for mandated inoculation, at various times invoked a number

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

of compelling government interests, often in broad terms, which could generally be categorized as follows:

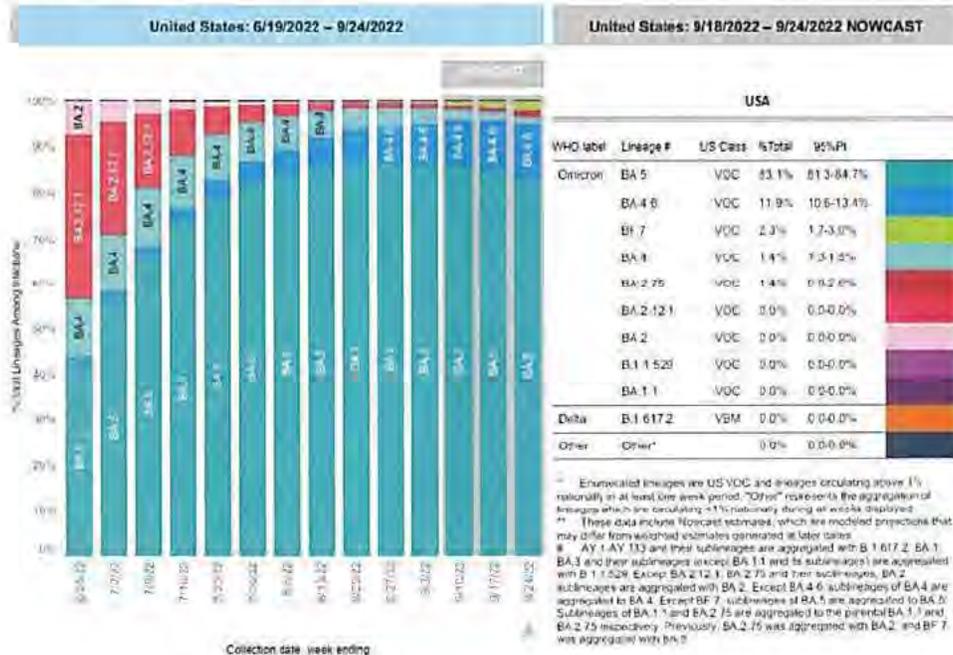
- a. the health and safety of the *force*,
- b. the health and safety of the individual *Sailor*, and
- c. organizational readiness, unit cohesion, and mission accomplishment.

As noted in paragraph (3), above, “RFRA, however, contemplates a ‘more focused’ inquiry: It ‘requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.’” *Burwell*, 573 U.S., at 694-95, *citing O Centro*, 546 U.S., at 430-431 (quoting [RFRA]). “This requires us to ‘loo[k] beyond broadly formulated interests’ and to ‘scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants’—in other words, to look to the marginal interest in enforcing the [government] mandate.” *Id.*, *citing O Centro*, *supra*, at 431.

8. Does the Navy’s requirement that **SWCC 3**, specifically, receive an injection with one of the COVID-19 pharmaceuticals further a compelling Navy interest in the health and safety of the force – that is, of **SWCC 3**’s shipmates? Is it necessary that **SWCC 3** receive one of these drugs – over his sincere religious objection – to protect the health and safety of the force? While I readily acknowledge the Navy’s interest in protecting the “health and safety of the force,” and have previously recommended denial of a number of religious accommodation requests on these grounds, I must also recognize the evolving factual reality of the virus. Whereas in the initial weeks of the vaccines’ rollout one could argue that mandatory injection of the Pfizer-Biontech or Moderna pharmaceuticals furthered the Navy’s compelling government interest in health and safety by curtailing infection and spread of SARS-CoV-2, Omicron and the growing body of data now available has voided that narrative.

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

9. As the CDC metrics below unambiguously illustrate, Omicron has crowded out Delta and all other strains of the SARS-CoV-2 virus; it is not only the dominant variant, but effectively, the sole variant currently active in our country and almost every country on Earth. Any new cases of non-Omicron variants no longer register in the CDC’s national data. And, as Omicron has asserted dominance, it has become irrefutably clear that the vaccines do little to reduce the transmission of the disease. In lieu of painstakingly cataloging the wealth of evidence illustrating the futility of the currently-available vaccinations against Omicron infection, I’ll add a more personal anecdote. Every senior member of this command – including the triad and every individual on the review chain for this correspondence – has recently caught, and recovered from, Omicron. We had all received double doses (or more) of the same pharmaceuticals **SWCC 3** seeks exemption from taking, but all of our interventions –



pharmaceutical and otherwise – were impotent against such a contagious and vaccine-resistant virus. Enclosure (2) tracks the COVID-19 infections and vaccination status of personnel in our small Headquarters element – hardly an endorsement for the efficacy of the vaccines in preventing infection, and impossible to ignore when honestly assessing whether compelled injection of Sailors like **SWCC 3** is necessary to protect his fellow Sailors.

10. Mirroring the anecdotal conclusions unavoidably drawn from Naval Special Warfare Group ELEVEN’s (NSWG-11) infection data (and that of my subordinate SEAL Teams), reference (c) emphasizes “it is increasingly clear that current vaccines provide, at most, partial and transient protection against infection, which decreases precipitously after a few months, with secondary transmission largely unaffected (in other words: an infected vaccinated person poses similar risks to others as an infected unvaccinated person). The CDC states: ‘anyone with Omicron infection, regardless of vaccination status or whether or not they have symptoms, can spread the virus to others.’ It is therefore inaccurate to infer a sustained or long-term reduction in transmission from a short-term reduction in infection.” Beyond the numerous studies making this point, a multitude

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

of real world case data has reflected, and public health and pharmaceutical authorities have admitted, the inefficacy of the COVID-19 vaccines in preventing infection. For instance, despite being hailed as one of the most vaccinated (and “boosted”) nations on Earth, Israel saw its largest ever case counts as Omicron spread throughout its borders. Despite a supermajority of its population vaccinated with the same Pfizer-Biontech formula mandated upon **SWCC 3**, Israel nevertheless saw its infection counts surge more than ten-fold the numbers of any prior wave, including waves before any SARS-CoV-2 shots were available (Enclosure (2)). In Iceland, an island nation with over 93% of adults vaccinated and 70% “boosted,” Omicron ushered in a 32,611% surge in cases since May 2021, when our nation’s Director of the National Institution of Allergy and Infectious Diseases remarked that if 70% of adults receive at least a single vaccination dose, “the chances of a surge are extraordinarily low.” (Enclosure (3)). My intent in rehashing statements like this is to illustrate just how comprehensively Omicron has changed the public health landscape and upended guidance and recommendations that were once considered almost axiomatic. Even vaccine manufacturers have conceded this: “We know that the two doses of the [Pfizer-Biontech] vaccine offer very limited protection, if any [from disease transmission].” That statement was made in a Yahoo Finance TV interview on 11 January 2022 by Albert Bourla, the CEO of Pfizer. Two days earlier, in an interview on CNN, Rochelle Wolinsky, Director of the CDC, conceded, “What [the vaccines] can’t do anymore is prevent transmission.” Why would the Navy suggest otherwise?

11. To maintain the trust and confidence of my subordinates, it is critical I speak truthfully and rationally, particularly in matters impacting their personal health and safety and their unalienable liberties. Bearing this in mind, I note that dozens of Sailors in my claimancy have already submitted religious exemption requests and received virtually identically worded digitally-signed letters from the Chief of Naval Personnel disapproving those requests. Suggesting that Sailors like **SWCC 3** disproportionately risk spreading COVID-19 to their shipmates, these disapproval letters all argue that “a waiver of immunizations would have a predictable and detrimental effect on your readiness *and the readiness of the Sailors who serve alongside you*” and that “you will inevitably be expected to live and work in close proximity with your shipmates.” Further, some of my Sailors requested and received copies of the documentation ostensibly undergirding those disapproval decisions and boilerplate letters². Even as Omicron continued to spread and grow in dominance, I noticed a static focus on the notion that the Pfizer-Biontech pharmaceutical prevents the spread of SARS-CoV-2 and *conveys immunity*. For instance, one of my claimancy Sailors, whose religious accommodation request was disapproved after Omicron had become the dominant strain, received “board notes” containing this paragraph articulating why compelled injection is, apparently, the only viable tool to prevent the spread of, or infection with, SARS-CoV-2: “*All alternative measures for preventing spread of disease are insufficient due to unique circumstances in naval service. Vaccination is the only viable option for achieving the compelling interest. Immunity is not instantaneous, and Sailors assigned to shore must be ready to deploy at a moment’s notice.*” Suggesting the approved vaccines convey immunity and prevent spread of disease, this assertion is not simply outdated, it’s observably false when applied to Omicron. While one might credibly argue the vaccines offer some marginal therapeutic benefit in the event a service member subsequently contracts the virus (and

² **SWCC 3** notes in his appeal that he has not received decisional documentation relating to the denial of his religious accommodation. He argues, “[t]his severely limits my ability to appeal my denial because I do not know what it is that I am appealing or on what grounds my request was denied.”

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

this would need to be an individually-tailored assessment, not one applied broadly to all Sailors, each with their own unique health characteristics and differing levels of immune protection), any such benefit is an *individual* benefit, not a *collective* benefit.³

12. The evidence is manifest and unambiguous that, at present, Omicron *is* COVID. It is, for all intents and purposes, the only variant posing infection risk to my Sailors – *all* my Sailors, regardless of vaccination status. Given the widely acknowledged inefficacy of the vaccines in conveying immunity and stopping the spread of COVID-19, the Navy does not have a compelling interest in forcing **SWCC 3** to receive one of these drugs, in violation of his religious beliefs, in the name of protecting the health and safety of his fellow service members.

13. Does the Navy's requirement that **SWCC 3**, specifically, receive an injection with one of the COVID-19 pharmaceuticals further a compelling Navy interest in protecting his health and safety? Stated another way, is it *necessary* that **SWCC 3** receive one of these drugs – over his sincere religious objection – to protect *his own* health and safety? In answering this question, RFRA requires an “individualized assessment,” an honest analysis – *to the person*, **SWCC 3** – of the marginal risk of remaining unvaccinated. Generalized statements that the vaccines are effective at reducing COVID case severity, hospitalization, and death rates have been repeated regularly by DON personnel. Perhaps these statements are accurate in many situations and for many individuals, yet RFRA requires more. Just how much risk to **SWCC 3**, a 28 year-old and a member of one of the most elite and healthy communities in the entire Navy, is there from the relatively-mild Omicron variant and its dominant strain, BA.5? Noting that the CDC's 11 August 2022 guidance aligned with the findings of over two hundred medical studies in acknowledging that “persons who have had COVID-19 but are not vaccinated have some degree of protection against severe illness from their previous infection,” reference (f), to what degree is this risk (which statistically is very small for a healthy male of **SWCC 3**'s age) even further mitigated by the protection provided by his prior SARS-CoV-2 infection? When **SWCC 3**'s original request for accommodation was denied, was his level of fitness properly assessed and weighed, as RFRA requires? His personal health? His assignment? His body fat percentage? Was whether his young age, sex, athletic background, and prior infection might render him more vulnerable to certain known complications or adverse events from the vaccines properly assessed and weighed?

14. Stated another way, for the Navy to have a compelling interest in forcing **SWCC 3**'s injection at the expense of his Constitutional right to free exercise, RFRA effectively requires a risk-benefit analysis.⁴ Just how great is the current risk posed to **SWCC 3** by COVID re-

³ Additionally, “[t]o be ethically acceptable, such severe restrictions of individual liberty [i.e., mandated vaccination under threat of employment loss] need to be justified not only by an individual benefit but by the expectation that vaccination reduces harm to others. Booster doses of Covid-19 vaccines provide no lasting reduction in the probability of infection or transmission[] and extremely low expected benefits to young healthy individuals, especially those who have already been infected.[] The expected harms to individuals and the harms of coercive mandates themselves are not counterbalanced by a large public health benefit; such harms and restrictions of liberty are therefore disproportionate and ethically unjustifiable.... The arguments presented above are relevant not only to [] booster mandates but also to [] policies that maintain primary two-dose Covid-19 vaccine mandates in 2022 in the face of high rates of previous SARS-CoV-2 infection” (Reference (d)).

⁴ In addition to RFRA effectively requiring a risk-benefit analysis, such an analysis also has strong ethical underpinnings. “There is an even stronger rationale for thorough and transparent risk-benefit assessment when interventions are mandated or when (given uncertainty or relevant population differences) some people might face

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

infection? Just how great is the benefit these injections would provide to **SWCC 3**? Are these risks and benefits considerable enough to justify the irreparable harm that would result from infringing on his religious liberties?^{5, 6} I do not believe they are. Whatever possible benefits injection may have on **SWCC 3**, a young, fit, healthy Special Warfare Combatant Crewman who has already contracted and recovered⁷ from SARS-CoV-2, these are outweighed by the irreparable injury of betraying his sincerely held religious beliefs.

15. Just how great is the risk to **SWCC 3** currently posed by SARS-CoV-2? With nearly 10 months of Omicron data to inform, there is no question that Omicron poses *much less* risk to those infected compared to the Delta, Alpha, or original viral strains. The body of evidence unambiguously reaching this conclusion is considerable; one such study, published in *The Lancet*, provides valuable insights stratified by age and prior vaccination status (Enclosure (5)⁸). For those in **SWCC 3**'s age range (20-29), the hospital admission rate from Omicron infection was 0.60%, and the death rate 0.002% (Enclosure (6), Table S4). While these numbers do not differentiate between vaccinated and unvaccinated populations, they similarly do not differentiate between those with natural immunity and those without, nor do they account for the underlying health, fitness, and co-morbidities (or lack thereof) of those within this age band. These data limitations notwithstanding, the study offers conclusive findings on the relative lack of severity of Omicron compared to earlier strains, the vaccine resistance of Omicron, and the considerable benefits of natural immunity.

16. The study's authors summarize its findings as follows: "The risk of severe outcomes following SARS-CoV-2 infection is substantially lower for omicron than for delta, with higher reductions for more severe endpoints and significant variation with age. Underlying the observed risks is a large reduction in intrinsic severity (in unvaccinated individuals) counterbalanced by a reduction in vaccine effectiveness. Documented previous SARS-CoV-2 infection offered some protections against hospitalization and high protection against death in unvaccinated individuals...." Regarding the finding estimating larger severity reductions for Omicron compared with Delta, the authors note this "agrees with observations that the proportion of hospitalized COVID-19 patients requiring intensive care or mechanical ventilation (or both) has been substantially lower during the omicron wave... than the preceding delta wave. The 80% overall reduction in the intrinsic risk of death that we estimate for omicron infection

harms not outweighed by individual benefits. In such cases, risk-benefit assessments should be stratified by demographic factors and updated as new data become available to reduce uncertainty" (Reference (d)).

⁵ "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

⁶ A Sailor objecting to vaccination on Free Exercise grounds suffers harm when the Navy "puts [the objector] to this choice": violate his religious beliefs or "face serious disciplinary action." *Holt*, 574 U.S. at 361

⁷ "It is not clear whether vaccination of previously infected individuals provides any meaningful benefits with respect to severe disease, especially for healthy young people.... [W]e maintain that if mandates remain then there is an ethical obligation...to provide evidence that the intervention confers an expected net benefit to individuals younger than 40 years in the context of the prevailing SARS-CoV-2 variants and pre-existing immunity. Without this, it is problematic to simply claim that Covid-19 vaccines are 'safe and effective' without specific risk-benefit analyses for different age categories and with consideration for individual health status, including evidence of prior infection, because risks of both disease and vaccination are highly variable according to these factors" (Reference (d)).

⁸ At the time of its publication, this was the "largest national study quantifying the risk of hospitalization or death after infection with omicron compared with delta, based on individual-level data on 1,516,702 COVID-19 cases, of whom 1,067,859 were infected with the omicron variant."

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

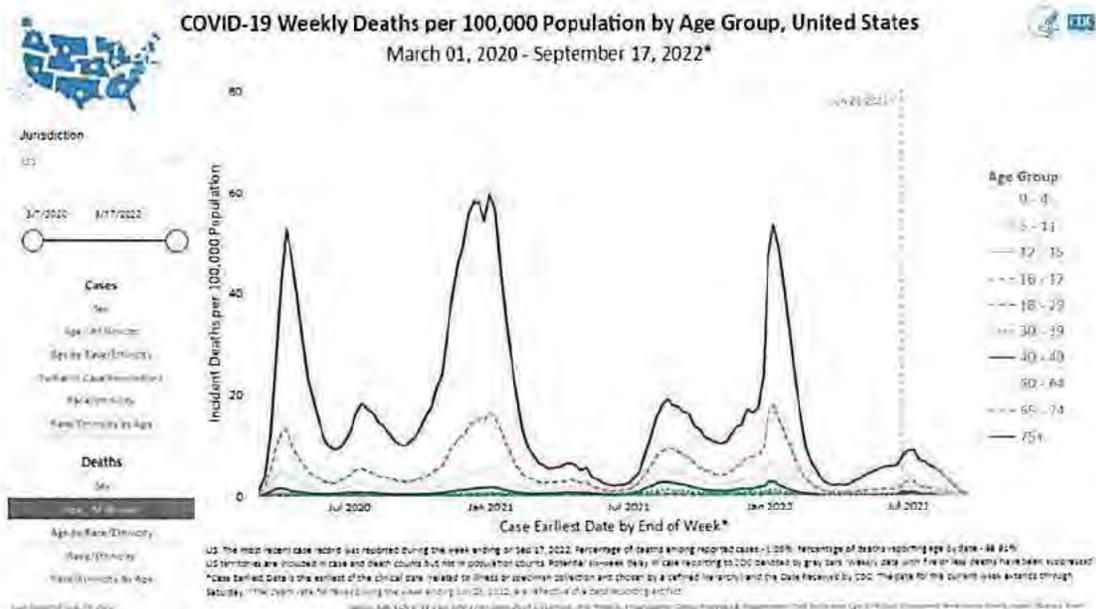
compared with that of delta will make the goal of living with COVID-19 in the absence of socially and economically disruptive public health interventions substantially easier to achieve at the current time.” Further, the study “estimated a larger reduction (comparing omicron with delta) in the risk of hospitalization and death in unvaccinated cases than for all cases [].... The relative risk of hospitalization or death in vaccinated cases compared with unvaccinated cases was lower for delta cases than for omicron cases []. These estimates indicate that the overall observed reductions in hospitalization and mortality risk understate the intrinsic reduction in the risk of severe infection outcomes associated with the delta to omicron transition, due to those reductions being partially counteracted by reductions in vaccine effectiveness.” Addressing the protection provided by natural immunity, the study notes: “In unvaccinated cases, documented past infection provides moderate protection against hospitalization and higher protection against death.... An imputation-based sensitivity analysis to examine the effect of under-ascertainment of past infections gave... estimates indicating a larger protective effect of past infection against all endpoints for unvaccinated individuals, and against hospital admission and death in vaccinated individuals.”

17. The government’s interest was at its most compelling when the risk from the disease was at its most pronounced. Just this week, the CDC published data underscoring just how much lower the risk from the weaker current subvariants is compared with the virus we were dealing with at the time the Navy’s vaccine mandate was instituted (Enclosure (7)⁹). “Using [data from 678 hospitals], CDC assessed in-hospital mortality risk overall and by demographic and clinical characteristics during the Delta (July-October 2021, early Omicron (January-March 2022), and later Omicron (April-June 2022) variant periods among patients hospitalized primarily for

⁹ Importantly, this report filtered out deaths from other causes in order to isolate mortality rates for those individuals hospitalized “primarily for COVID-19.” Many reputable immunologists and researchers argue “that the daily death toll attributed to COVID is exaggerated because many deaths blamed on the disease are actually from other causes. Some of the people who died for other reasons happened to also test positive for the coronavirus. ‘We are now seeing consistently that more than 70% of our COVID hospitalizations are in that category,’ says Dr. Shira Doron, an infectious disease specialist at the Tufts Medical Center and a professor at the Tufts University School of Medicine. ‘If you’re counting them all as hospitalizations, and then those people die and you count them all as COVID deaths, you are pretty dramatically overcounting.’ If deaths were classified more accurately, then the daily death toll would be closer to the toll the flu takes during a typical season, Doron says. If this is true, the odds of a person dying if they get a COVID infection – [] the case fatality rate – would be about the same as the flu now, which is estimated to be around 0.1%, or perhaps even lower” (Reference (e)).

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

COVID-19.... Crude mortality risk (cMR) (deaths per 100 patients hospitalized primarily for COVID-19) was lower during the early Omicron (13.1) and later Omicron (4.9) periods than during the Delta (15.1) period (p<0.001). Adjusted mortality risk was lower during the Omicron periods than during the Delta period for patients aged ≥ 18 years, males and females, all racial and ethnic groups, persons with and without disabilities, and those with one or more underlying medical conditions.... *During the later Omicron period, 81.9% of in-hospital deaths occurred among adults aged ≥ 65 years and 73.4% occurred among persons with three or more underlying medical conditions.*” In short, the CDC’s researchers conclude, “[r]isk for severe COVID-19 increases with age, disability, and underlying medical conditions. The SARS-CoV-2 Omicron variant is more infectious but has been associated with less severe disease.” What is perhaps most notable about Omicron is just how contagious and transmissible it is, a characteristic unabated by the vaccines, as documented above. While wildly contagious to both the vaccinated and unvaccinated, the risks of Omicron are disproportionately borne by the elderly and infirm (certainly not by the young, healthy, and previously-infected/recovered such as **SWCC 3**.) Indeed, recent CDC data documents the death risk posed to those in **SWCC 3**’s age group is 60 times less than those aged 65 to 74, 140 times less than those aged 75 to 84, and 330 times less than those over 85 – and this doesn’t even take into account the health and fitness or natural/vaccinated immunity levels of those within **SWCC 3**’s age group (Enclosure (8)). A welcome reality of the “later Omicron” landscape is that hospitalizations and deaths from SARS-CoV-2 in young, healthy individuals, like **SWCC 3**, are so rare as to hardly register on the CDC’s own charts (see below)¹⁰. Although some may point to “long COVID” as a risk justifying compelled vaccination of even the young and healthy, Dr. Monica Gandhi, an infectious disease specialist at the University of California, San Francisco, is quick to push back,



¹⁰ Although visually capturing just how low the SARS-CoV-2 death risk is for the young, this chart nevertheless overstates that risk, for the reasons discussed in the prior footnote, as it counts all deaths *with* a positive COVID test, even those *from* other causes. Another critical factor suggesting the actual death rate – for all age groups – may be even lower yet is the underreporting of infections due to the emergent prevalence of at-home testing, which reduces the documented number of confirmed cases – i.e., the denominator in the number of deaths over confirmed cases (the fatality rate).

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

noting that “much of the estimated risk for long COVID comes from people who got seriously ill at the start of the pandemic” and that “if you account for that, the risk of long term health problems may not be greater from COVID than from other viral infections like the flu.... ‘It was really severe COVID that led to long COVID. And as the disease has become milder, we’re seeing lower rates of long COVID’” (Reference (e)).

18. Acknowledging that the risk posed by the Omicron variant for those aged 20-29 without multiple comorbidities is very low, and that both a healthy, active lifestyle and prior SARS-CoV-2 infection and recovery further reduce this low risk, I nevertheless acknowledge that the risk is not non-existent. What, then, would be the expected benefit of injection with the Pfizer or Moderna vaccines?¹¹ Dr. Paul Offit, vaccine developer, pediatrician, and a member of the FDA’s Vaccine Advisory Committee, said the following in a CNN interview on 1 September 2022: “Who are those people – who are those people who are getting hospitalized? It really falls into three groups. One is the elderly, meaning people over 65. Two is the kind of people who have serious health problems – say, chronic lung disease – which, when they get a mild or moderate infection lands them in the hospital. And, there is people who are immune compromised. When you’re asking people to get a vaccine, I think there has to be clear evidence of benefit.... You’d like to have at least human data where you see a clear and dramatic increase [of protection].... If you don’t have that, if there’s not clear evidence of benefit, then it’s not fair to ask people to take it no matter how small the benefit – the benefit should be *clear*.” Stated differently, “A thorough *ethical* evaluation of risks and benefits requires relevant *empirical* data, especially where risks and benefits can be quantified to a reasonable degree of certainty. Relevant data include not only those regarding average individual vaccine safety and effectiveness but also age-stratification of these data as well as the protective effect of prior infection and the effectiveness of vaccines against transmission” (Reference (d)).

19. Critically, any benefits of the mandated vaccines should only be discussed in relation to the Omicron variant of SARS-CoV-2, the only present variant of concern. As the aforementioned *Lancet*-published study exhaustingly documented, vaccine effectiveness across all age groups has been considerably worse against the Omicron variants, particularly the currently dominant BA.4 and BA.5 subvariants, compared to Delta and earlier SARS-CoV-2 strains. According to CDC data (reference (f)) presented on 1 September, data patterns revealed vaccine effectiveness was “waning substantially,” LCDR Ruth Link-Gelles said while presenting the data to the CDC’s vaccine advisory panel. In particular, this trend of diminishing vaccine efficacy was even more pronounced in data drawn from the months during which the dominant BA.4 and BA.5 subvariants displaced prior Omicron subvariants. For instance, across all age groups, even the elderly, “immunocompetent” adults – the adult population with the immunocompromised

¹¹ I recognize that “Comirnaty” and “Spikevax” are the brand names for, respectively, Pfizer’s and Moderna’s SARS-CoV-2 vaccines and that these branded vaccines have been approved by the FDA. I also recognize that the formulations of these branded, FDA-approved pharmaceuticals are ostensibly the same as the formulations for the non-branded Emergency Use Authorized (EUA) pharmaceuticals the overwhelming majority of Sailors in my claimancy have received. Throughout this endorsement, I refer to the vaccines by their manufactures’ names simply because the actual FDA-approved pharmaceuticals – those labeled either “Comirnaty” or “Spikevax” – remain largely unavailable in the United States. The professed interchangeability of the formulations notwithstanding, the specific vials my Sailors receive have “been granted an EUA by the FDA, but are still not fully approved [unlike those specifically labeled “Comirnaty” or “Spikevax”] and, therefore, provide a less “transparent legal route to adequate compensation” in case of injury (Reference (d)).

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

excluded – realized only 44% protection against emergency room and urgent care visits during the months of BA.4 and BA.5 subvariant dominance. This protection waned to a mere 26% after 150 days from receipt of the second dose. Similarly, protection against hospitalization declined during the months of BA.4 and BA.5 subvariant dominance, with immunocompetent adults, such as **SWCC 3**, realizing a mere 25% protective benefit against hospitalization beyond 150 days from receipt of the second dose. Invoking Dr. Offit's words in the paragraph above, is this benefit *clear* enough to justify infringement of constitutionally protected liberties?

20. Similarly, recent data sets from the health departments of many states underscore the worsening performance of the current shots as increasingly vaccine-evasive Omicron subvariants, like BA.4 and BA.5, emerge and assert dominance. Like the CDC data discussed in the paragraph above, this state-level data is mostly recent, accounting for the current dominant subvariants. This contrasts with much of the data informing references (g), (h), and (i), a great deal of which references numbers from the Delta wave and earlier waves of variants for which the vaccines demonstrated higher effectiveness. Further, in 25 states reporting “breakthrough” data (in either SARS-CoV-2 cases, hospitalizations, or deaths), the vaccinated comprise a majority of at least one of these breakthrough metrics (and, in some cases, all). In over half of these 25 states, the percentage of vaccinated residents comprising one of these breakthrough categories *exceeds* the statewide vaccination¹² percentage. Stated another way, in a majority of these states, vaccinated individuals now appear *more* likely to either contract SARS-CoV-2, be hospitalized for SARS-CoV-2, or die of SARS-CoV-2 compared to their unvaccinated counterparts. Although these raw numbers often (but not always) do not account for factors such as age, and although not all states conveniently report all three metrics (cases, hospitalizations, and deaths) by vaccination status, the cumulative impact of the reported data – both the more recent CDC data and the statewide breakthrough data – does not provide a resounding endorsement for the efficacy of the vaccines against BA.4 and BA.5.

21. As noted above, in a number of states the percentage of at least one metric – post vaccination SARS-CoV-2 cases, hospitalizations, or deaths – has exceeded the vaccinated percentage of the state population in recent months.

a. In **Minnesota**, from 5 June to 3 July 2022, 71% of SARS-CoV-2 cases (29,660 cases) and 80% of deaths (107 deaths) were observed in the vaccinated population. 66% of Minnesotans were vaccinated during this period (Reference (j)).

b. In **Oklahoma**, from 5 June to 5 July 2022, 64% of SARS-CoV-2 hospitalizations (277) were observed in the vaccinated population. 51% of Oklahomans were vaccinated during this period (Reference (k)).

c. In **Wisconsin**, during June 2022, 65% of new cases (31,702), 64% percent of hospitalizations (634), and 66% of deaths (69) were observed in the vaccinated population. 61.5% of Wisconsin residents were vaccinated during this period (Enclosure (9)).

¹² For the purposes of this comparison and the data vignettes in the below paragraph, those who are “boosted” are included in the “vaccinated” category.

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

d. In **Idaho**, from 5 June to 2 July 2022, 53% of hospitalizations (89) were observed in the vaccinated population. 52% of Idaho residents were vaccinated during this period (Enclosure (10)).

e. In **Rhode Island**, during June 2022, 76% of deaths (22) were observed in the vaccinated population. 75.6% of Rhode Island residents were vaccinated during this period (Reference (l)).



f. In **Utah**, from 5 June to 26 June 2022, 67% of cases (17,856) and 67% of hospitalizations (623) were observed in the vaccinated population. 62% of Utah residents were vaccinated during this period (Reference (m)).

g. In **Kentucky**, during June 2022, 67% of deaths (55) were observed in the fully (53) or partially (2) vaccinated population. 66% of Kentucky residents were vaccinated during this period (Enclosure (11)).

h. In **Vermont**, during June 2022, 84% of hospitalizations (32) and 91% of deaths (10) were observed in the vaccinated population. 78.6% of Vermont residents were vaccinated during this period (Enclosure (12)).

i. In **Alaska**, during March 2022¹³, 64.5% of cases (3,995) were observed in the vaccinated population. 59.1% of Alaska residents were vaccinated during this period (Reference (n)).

j. In **Mississippi**, from 1 April through 1 August 2022, 54% of deaths were observed in the vaccinated population. 51.7% of Mississippi residents were vaccinated during this period (Enclosure (13)).

k. In **South Dakota**, during June 2022, 74% of hospitalizations (141) and 66.6% of deaths (8) were observed in the vaccinated population. 58% of South Dakota residents were vaccinated during this period (Reference (o)).

l. In **Louisiana**, during the week of 21 July, 61% of deaths were observed in the vaccinated population. 52% of Louisiana residents were vaccinated during this period (Enclosure (14)).

¹³ Although Alaska's Department of Health had regularly posted quarterly COVID-19 updates, which included breakthrough data, this update from March 2022 (available at: https://health.alaska.gov/dph/Epi/id/siteassets/pages/HumanCoV/COVID_monthly_update.pdf) is the last such update posted on the Department's webpage.

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

22. Although the reporting formats and reporting periods differ from state to state (most nevertheless encompass periods of BA.4 and BA.5 dominance), and although the percentages of vaccinated personnel accounting for breakthrough metrics does not exceed the statewide vaccination rate in 11 of 25 states, the statewide breakthrough data – across the board – conveys an unmistakable shift from the earlier stages of the pandemic, when unvaccinated individuals comprised the overwhelming majority of state-reported SARS-CoV-2 cases, hospitalizations, and deaths and when the vaccines apparently performed better against the then-dominant variants and subvariants of SARS-CoV-2. Accordingly, the weight of recent CDC and statewide data undermines the argument that the Navy’s interest in **SWCC 3**’s health and safety is somehow compelling enough to justify his injection in violation of his religious beliefs. Might the vaccines provide him *some* benefit? Indeed. Nevertheless, good faith (and a wealth of data) requires acknowledgement that the risk he faces from the current subvariants is not all that great. The protection offered from the current FDA-approved vaccines is not all that good or long-lasting. And, **SWCC 3** already has some protective benefit from his prior infection and recovery. Furthermore, this analysis only considers the potential health *benefits* of **SWCC 3**’s injection, yet the *risks* accompanying injection must also be considered.¹⁴

23. As discussed above, in order to properly assess (to the degree RFRA requires) whether the Navy’s requirement that **SWCC 3**, specifically, receive an injection furthers a compelling Navy interest in protecting health and safety at the individual level – i.e., **SWCC 3**’s own health and safety – we must assess whether it is *necessary* that **SWCC 3** receive one of these drugs – over his sincere religious objection – in order to protect *his own* health and safety. In order to properly make this assessment “to the person,” we must weigh the risk the current form of the virus presents to **SWCC 3** as well as the *benefits* the currently available FDA-approved vaccines would reasonably provide to **SWCC 3**. Nevertheless, any analysis that fails to consider and weigh the *risks* these drugs present to **SWCC 3** would be incomplete. As noted above, “RFRA requires an ‘individualized assessment,’ an honest analysis – to the person, **SWCC 3** – of the marginal risk of *remaining unvaccinated*.” An individualized assessment of the marginal risk of *getting vaccinated* logically follows.

24. We have been often told that the current FDA-approved vaccines are “safe and effective.” While this may be true generally, the known risks presented by the vaccines continue to mount and often operate in an age-specific manner. Additionally, it merits acknowledgement that the current FDA-approved vaccines for SARS-CoV-2, both utilizing Messenger RNA (mRNA) technology (a novel platform with “unknown unknowns”), are quite different in several respects from other vaccines, most notably the flu vaccine, my Sailors receive annually. These mRNA vaccines are certainly more reactogenic, with a higher proportion of Sailors forced to miss work following injection and a higher number of adverse events compared to, for instance, the flu vaccine. For example, one of my subordinate commanding officers, a relatively young and exceedingly fit SEAL who, like **SWCC 3**, had previously contracted and recovered from SARS-CoV-2, experienced significant adverse reactions to the mRNA injection, falling far more ill than at any point during his prior SARS-CoV-2 infection. My intent in sharing this anecdote is not to suggest his experience is universal or that these pharmaceuticals are more harmful than

¹⁴ “While harms from Covid-19 vaccines are rare they should be factored into policy recommendations” (Reference (d)).

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

the virus but, rather, to simply illustrate in a personally-observed manner that these shots can cause harmful adverse reactions, especially to those who had previously contracted SARS-CoV-2. “In those with a prior SARS-CoV-2 infection, post-vaccination symptoms causing missed work or daily activities are reported two- to -three-fold more often than those without a history of infection, a major concern given that the seroprevalence among adults aged 18-49 is now well above the February 2022 estimate of 67%” (Reference (d)). Another distinguishing characteristic of the two mandated SARS-CoV-2 vaccines is the fact they are formulated to counteract *past* strains of SARS-CoV-2 (hence their waning efficacy). And, perhaps most significantly, the known risks of these mRNA pharmaceuticals appear greatest in the young, those who generally face the lowest risk from the virus itself.

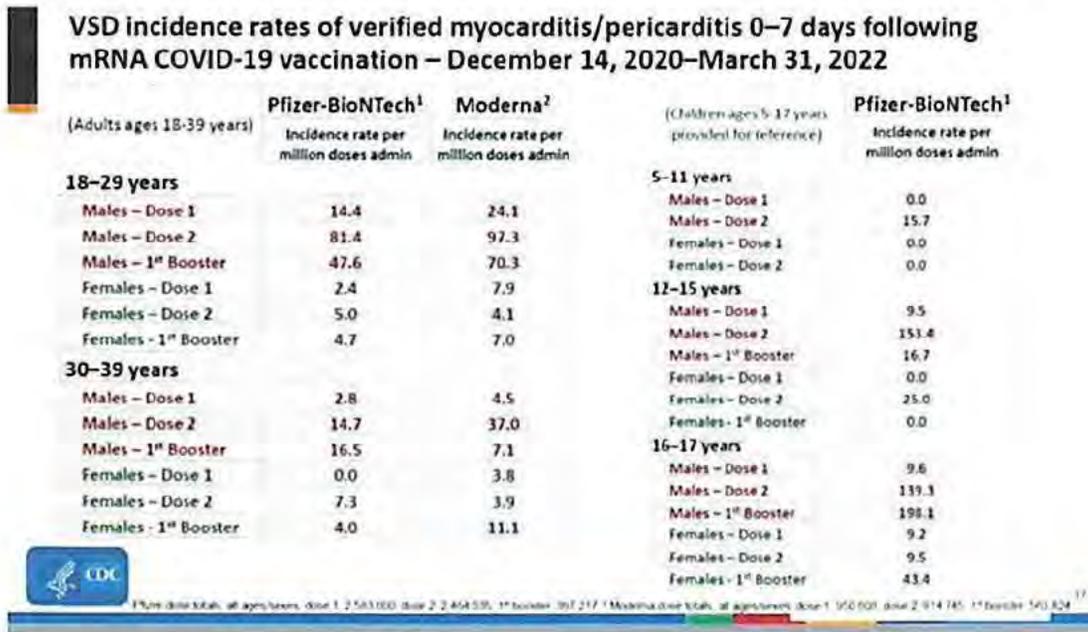
25. Vaccination-associated myo/pericarditis is often referenced as “rare, (typically) ‘mild’ and followed by rapid recovery with anti-inflammatory treatment. [However, t]he reviews have not framed vaccine-associated risks versus infection-associated risks using compatible denominators based on exposure (vaccination) and infection (seroprevalence), thus the infection-associated risks have been overstated by at least a factor of four according to CDC estimates of the burden of Covid-19 illness. [Reference (p)] However, it has been found to occur in as many as 1 in 2652 males aged 12-17 years old and 1 in 1862 males aged 18-24 years old after the second dose [Reference (q) ¹⁵] (and as high as 1/1300 after the second dose in a Pfizer-Moderna combination). [Reference (r)] An Israeli study described 1 in 5 cases among 16-29 year-olds to be of intermediate severity, meaning these cases had persistent new/worsening abnormalities in left ventricular (LV) function, or persistent ECG anomalies, or frequent non-sustained ventricular arrhythmias without syncope [Reference (s)].... The potential long-term impact of scar tissue on heart conduction remains unknown. [] *Post-vaccination myocarditis has been found to be equivalent to or exceed the risk of post-Covid myocarditis in males less than 40 years old despite the lack of seroprevalence-based estimates of Covid-associated myocarditis*¹⁶. [Reference (t)]” (Reference (d)). (Emphasis mine)

26. According to the CDC, incidence of myocarditis is significantly elevated for males in [REDACTED] SWCC’s age group, even with the shortcomings in the VSD’s search algorithm discussed in footnote (15).

¹⁵ “We identified additional valid cases of myopericarditis following an mRNA vaccination that would be missed by the VSD’s search algorithm, which depends on select hospital discharge diagnosis codes. *The true incidence of myopericarditis is markedly higher than the incidence reported to US advisory committees in the fall of 2021.* The VSD should validate its search algorithm to improve its sensitivity for myopericarditis.” (Emphasis mine)

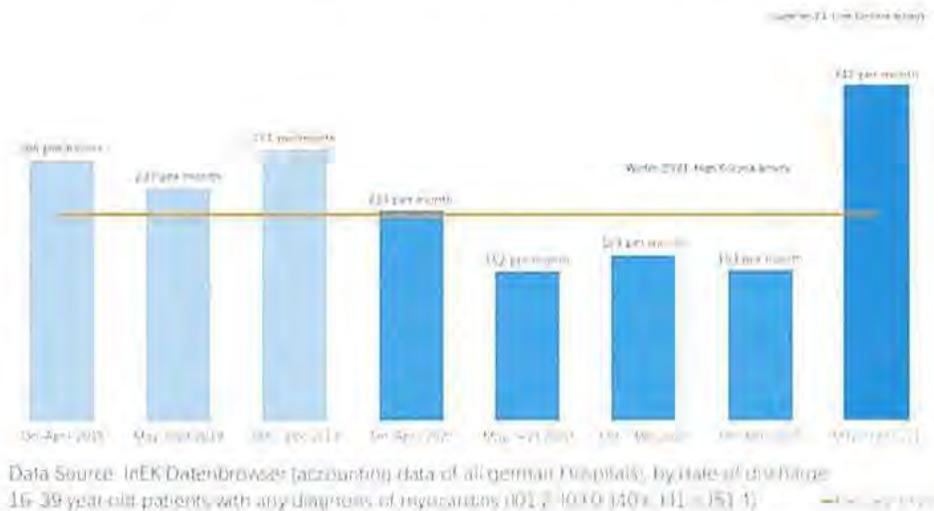
¹⁶ Although I acknowledge statements to the contrary, such as that in reference (v), these overly-broad and generalized statements that “COVID-19 infection poses higher risk for myocarditis than vaccines” ignore the difference between, for instance, a 28-year old man and an 88-year old woman. Lumping *everyone* together hides critical safety signals, such as the emergent reality that, in the age of weaker Omicron subvariant dominance, the mRNA vaccines now can cause more myocarditis in men under 40 than COVID-19 infection. This conclusion (which is especially pronounced “after a second dose of the [Moderna] vaccine”) is supported by the data in reference (t), which requires careful parsing (especially Table 2) due to the reporting format. Additionally, by lumping all men under 40 together, the study obscures the outsized harm of myocarditis posed, for instance, to 16-24 year-old males.

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE



27. Similarly, German hospital data captured significantly elevated myocarditis events in German 16 to 39 year-olds during the summer of 2021, a period of relatively low SARS-CoV-2 infection activity in Germany, compared to the same period during the summer of 2020, when no one had yet received an mRNA vaccine. If the 2021 spike in myocarditis was caused by SARS-CoV-2 infection, why is no prior infection-induced spike reflected in these numbers? (In fact,

Myocarditis Cases 16-39y in German Hospitals



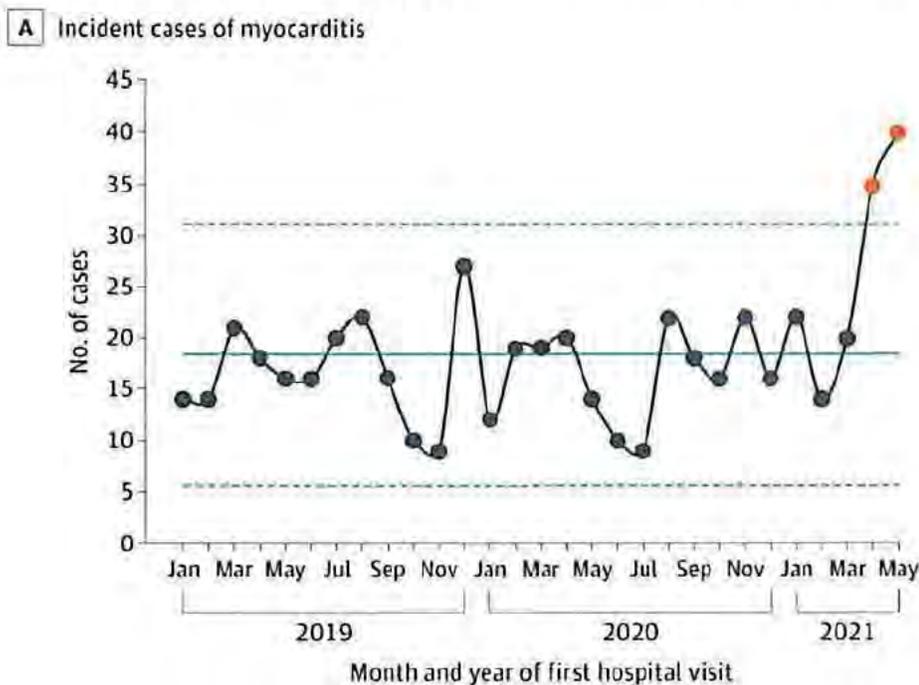
the myocarditis case rates in this age group were consistently at or below the pre-SARS-CoV-2 average until implementation of mass mRNA vaccination of this age group.) mRNA vaccines now can cause more myocarditis in men under 40 than COVID-19 infection. This conclusion (which is especially pronounced “after a second dose of the [Moderna] vaccine”) is supported by the data in reference (t), which requires careful parsing (especially

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

Table 2) due to the reporting format. Additionally, by lumping all men under 40 together, the study obscures the outsized harm of myocarditis posed, for instance, to 16-24 year-old males.

28. Additional research tracked the data of patients who were administered SARS-CoV-2 vaccinations in 40 hospitals in Washington, Oregon, Montana, and Los Angeles County within the same hospital system, flagging those vaccinated patients “who subsequently had emergency department or inpatient encounters with diagnoses of myocarditis, myopericarditis, or pericarditis” (Reference (w)). This data mirrors that from German hospitals, showing peaks in myocarditis, particularly in younger males, after mRNA vaccine administration.

Figure. Monthly Number of Inpatient and Emergency Department Cases of Myocarditis and Pericarditis at 40 Hospitals in the Western US



“Two distinct self-limited syndromes, myocarditis and pericarditis, were observed after COVID-19 vaccination. Myocarditis developed rapidly in younger patients, mostly after the second vaccination.... Some vaccines are associated with myocarditis, including mRNA vaccines, and the Centers for Disease Control and Prevention recently reported a possible association between COVID-19 mRNA vaccines and myocarditis, primarily in younger male individuals within a few days after the second vaccination, at an incidence of about 4.8 cases per 1 million. This study shows a similar pattern, although at higher incidence, suggesting vaccine adverse event underreporting.... Temporal association does not prove causation, although the short span between vaccination and myocarditis onset and the elevated incidences of myocarditis... in the study hospitals lend support to a possible relationship.”

29. Furthermore, data from the Pfizer and Moderna phase III clinical trials, much of which was not available until relatively recently, also illustrates the excess risk of serious adverse events resulting from these manufacturers’ mRNA vaccines. A recent study of this data “used a simple

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

harm-benefit framework to place [its] results in context, comparing risks of excess serious AESIs [(adverse events of special interest)¹⁷] against reductions in COVID-19 hospitalization” (Reference (x)). Most notably, “In the Moderna trial, the excess risk of serious AESIs (15.1 per 10,000 participants) was higher than the risk reduction for COVID-19 hospitalization relative to the placebo group (6.4 per 10,000 participants). In the Pfizer trial, the excess risk of serious AESIs (10.1 per 10,000) was higher than the risk reduction for COVID-19 hospitalization relative to the placebo group (2.3 per 10,000 participants).” The study’s authors later conclude, “These results raise concerns that mRNA vaccines are associated with more harm than initially estimated at the time of emergency authorization.... Rational policy formation should consider potential harms alongside potential benefits. To illustrate this need in the present context, we conducted a simple harm-benefit comparison using the trial data comparing excess risk of serious AESI against reductions in COVID-19 hospitalization. *We found excess risk of serious AESIs to exceed the reduction in COVID-19 hospitalizations in both Pfizer and Moderna trials.*” (Emphasis mine.) Of particular relevance to the risk-benefit analysis with respect to **SWCC 3**, “harm-benefit ratios would presumably shift towards harm for those with lower risk of serious COVID-19 outcomes—such as those with natural immunity, younger age or no comorbidities. Similarly, waning vaccine effectiveness, decreased viral virulence, and increasing degree of immune escape from vaccines might further shift the harm-benefit ratio toward harm.” (Emphasis in original.)

30. Tying these threads together, the key question is not whether the current FDA-approved vaccines are 100 percent safe and effective. Multiple states and western countries believe they are not¹⁸, but many vaccines with lower effectiveness can still reduce disease. The key question, is whether the Navy’s interest in **SWCC 3**’s individual health and safety is sufficiently compelling, given the present factual landscape, to justify injecting him with one of these drugs over his sincere religious objection. It is not.

a. SARS-CoV-2 has always operated in a highly age-specific manner. That remains true with the dominant BA.5 (and less dominant BA.4) Omicron subvariant.

b. **SWCC 3** is in an age group at one of the lowest risk levels, and with one of the lowest public health burdens, from SARS-CoV-2 and is at statistically miniscule risk of severe disease or death from the less-dangerous Omicron variant.

c. As natural immunity has repeatedly been documented to provide protection from SARS-CoV-2 re-infection, hospitalization, and death (as recently acknowledged by the CDC) – protection that’s longer-lasting than that from the quickly-waning mRNA vaccines – **SWCC 3**, who has contracted and recovered from SARS-CoV-2, is at even less risk from this relatively mild virus than the generalized statistics for his age group suggest.

¹⁷ “In 2020, prior to COVID-19 vaccine rollout, the Brighton Collaboration created a priority list, endorsed by the World Health Organization, of potential adverse events relevant to COVID-19 vaccines. We adapted the Brighton Collaboration list to evaluate serious adverse events of special interest observed in mRNA COVID-19 vaccine trials” (Reference (x)).

¹⁸ If they were, it’s difficult envisioning multiple European countries, the state of Florida, and Kaiser Northwest restricting or cautioning against the use of Moderna shots in younger populations and Denmark effectively restricting both vaccines for almost everyone under the age of 50.

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

d. In addition to his young age and natural immunity, SWCC 3's personal health and fitness level and absence of comorbidities further reduces the statistically miniscule risk he faces from SARS-CoV-2 reinfection.

e. While there may yet be some negligible benefit from the mRNA vaccines in this omicron-dominant SARS-CoV-2 landscape, there certainly isn't the "clear and dramatic increase [of protection]" (Dr. Offit's verbiage) to justify these drugs for SWCC 3. While these are the same vaccines from 2020 and 2021, this is not the same virus. Today's variants are less lethal and far better at evading yesterday's vaccines.

f. As such, the leaky vaccines "provide a low impact on hospitalization and a low impact on transmission for an age group with a low prospect of benefit" (Reference (d)).

g. Furthermore, the vaccines carry risks of their own, particularly to young males, like SWCC 3, who have already contracted SARS-CoV-2.

h. Beyond their documented post-injection reactogenic qualities, causing symptoms and requiring work absences at significantly heightened rates for those with prior SARS-CoV-2 infection, the risk of adverse events, captured in real world and clinic trial data, is too great to ignore.

31. I will not argue the risks of the shots exceed the risk of Omicron to SWCC 3. I will, however, acknowledge the growing body of scholarly, data-driven research credibly making that argument. Returning to the core question posed by RFRA, in light of the aforementioned data, scholarly studies, and hundreds of observable touchpoints across my claimancy since Omicron became the dominant variant, I believe that whatever the marginal benefit these shots might provide SWCC 3, they are not *necessary* to protect his personal health and safety. Broadly speaking, these shots might advance "military readiness," "health and safety," and "good order and discipline"¹⁹. Applied to the person of SWCC 3 against the present factual landscape, however, these generalized interests do not clear the "high bar" required by RFRA.

32. **Does the Navy's requirement that SWCC 3, specifically, receive an injection with one of the COVID-19 pharmaceuticals further a compelling Navy interest in organizational readiness, unit cohesion, and mission accomplishment?** Stated another way, is it *necessary* that SWCC 3 receive one of these drugs – over his sincere religious objection – to avoid a predictable and detrimental impact to his Navy Reserve Unit (NRU) or to the Navy's military readiness and ability to execute its missions? For the reasons discussed below, I do not believe it is.

¹⁹ A federal official "cannot simply utter[] magic words...and as a result receive unlimited deference from those of us charged with resolving these disputes." *Davila v. Gladden*, 777 F.3d 1198, 1206-07 (11th Cir. 2015) (citing *O Centro*, 546 U.S. at 438). "Instead, the government must proffer 'specific and reliable evidence' (not formulaic and generic commands, policies, and conclusions) demonstrating that the marginal benefit flowing from a specific denial furthers a compelling government interest." *Colonel Financial Management Officer* at 35 (citing *Davila*, 777 F.3d at 1206).

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

33. I've observed broad, generalized concerns that accommodation of Sailors like **SWCC 3** would possibly "have an adverse impact on mission accomplishment, including military readiness, unit cohesion and good order and discipline" or "have a predictable and detrimental effect on the readiness" of accommodated Sailors and their shipmates – but, specifically, how so? At this point, nearly three years into the new COVID reality, I remain uncertain as to what the *specific* concern is with granting **SWCC 3** a religious accommodation. I certainly appreciate the Navy's "broadly formulated interests", but I cannot ascertain just what, specifically, is "the *marginal* interest in enforcing the [government] mandate[.]" *Burwell*, 573 U.S., at 694-95, *citing O Centro*, 546 U.S., at 431 (emphasis mine). Nor can I ascertain what, specifically, is the marginal risk of **SWCC 3** serving his country without these specific vaccines.

34. Acknowledging that RFRA requires a "more focused" inquiry, how, specifically, would accommodating **SWCC 3** have a "predictable and detrimental" impact on the "Sailors who serve alongside" him? Surely, given the widely-acknowledged and documented inefficacy of the vaccines in preventing the spread of SARS-CoV-2 (discussed in paragraphs eight through 12, above), one cannot credibly argue that **SWCC 3**'s vaccination status somehow places the health and safety of his mostly-vaccinated shipmates at outsized risk of contracting COVID. Additionally, given how miniscule the risk posed to **SWCC 3**'s own health and safety by SARS-CoV-2 is (discussed in paragraphs 13 through 31), one cannot credibly argue that, in spite of his young age, exemplary health and fitness, and natural immunity, **SWCC 3**'s vaccination status somehow places his own health and safety at outsized risk and that this marginal risk, if any, would predictably and detrimentally impact his own military readiness or that of his shipmates.

35. Given the shortcomings of the above-mentioned "health and safety"-rooted arguments when posited against the evolving factual backdrop of a much-weakened virus, the statistically negligible SARS-CoV-2 risk to **SWCC 3**, and the documented deficiencies of the vaccines relative to BA.4, BA.5, and newer subvariants, I can only conclude that invocations of "broadly formulated interests" like "military readiness" and "mission accomplishment," are somehow rooted in **SWCC 3**'s "deployability," and that of other religiously-objecting Sailors like him. Although the Chief of Naval Personnel's templated denial of **SWCC 3**'s religious accommodation request largely alludes to "health and safety" concerns for **SWCC 3** and those shipmates he "will inevitably be expected to live and work in close proximity with," the denial letter in response to the religious accommodation *appeal* of another of my Sailors notes that "[I]ack of worldwide deployability affects organizational readiness" and also that the Sailor's Selected Reserve (SELRES) status requires that he "be continuously screened for immediate voluntary or involuntary mobilization availability.... By regulation, you are required to be prepared to report to your supporting Navy Reserve Center within 24 hours of receiving mobilization orders." No doubt, "worldwide deployability affects organizational readiness." Nevertheless, applying this argument as grounds for depriving **SWCC 3** of his free exercise rights and denying his appeal would be disingenuous, because the proximate and most-immediate cause of **SWCC 3**'s present non-deployability is not that he is unfit, unqualified, or unable to deploy but, quite simply, that the military won't allow him to deploy. And herein lies the rub: on one hand is the Navy's COVID travel policies, which I will unequivocally enforce as directed; on the other is my oath and my charge of command. I will carry out my orders as delivered, yet my role in this process – and my obligations under RFRA and implementing

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

instructions, places me well outside my comfort zone, as it's difficult to reconcile my support for this policy broadly and my intent to live up to my oath and to my charge of command. On one hand, I acknowledge this policy (a policy I believe was implemented with noble intentions) effectively preventing the official travel, much less the mobilization, of **SWCC 3** and Sailors like him so long as he remains unvaccinated – and, *personally*, I want this Sailor to get the vaccine. On the other hand, I must also acknowledge the “high bar” of RFRA and the “to the person” inquiry it imposes and, from my vantage point as **SWCC 3**'s Commander (and, essentially, as your sensor at the point of impact), I must concede the COVID travel policy does not meet the high bar for *this individual Sailor in this individual situation*.

36. As the Commander of Naval Special Warfare's (NSW) Reserve Component (RC), I am responsible for mobilizing SELRES members to fill validated and vetted NSW and Special Operations Command (SOCOM) requirements, a task that is growing more difficult for reasons I will later address. In the interests of fairness and transparency, NSWG-11 mobilizes SELRES members to fill requirements in order of dwell status – that is, the qualified SELRES member out of dwell the longest is the member who is “tagged” for mobilization. Recognizing that **SWCC 3** will be coming out of dwell later this year, I would like to be able to deploy him and NSWG-11 claimancy Sailors like him, and I am confident he presents no outsized risk to the health and safety of my force or that of our partner force personnel. Similarly, I am confident he presents no outsized risk to the missions my RC force supports nor to relations with our foreign partners. Although I want and need to deploy Sailors like **SWCC 3** to mobilization billets for which they are well suited temperamentally and experientially, current policy – specifically references (y) and (z) – prevents me from doing so. The country entry requirements for all the nations where I might mobilize **SWCC 3** draw no significant distinction between vaccinated and unvaccinated travelers, so his vaccination status doesn't prevent him from entering these countries, yet our travel policies²⁰ effectively preclude me²¹ from sending him and leveraging his valuable skillset in service of our nation abroad.²² In short, while **SWCC 3**'s deployability might currently require vaccination against SARS-CoV-2, that is only because we've chosen to implement such a requirement. The military “cannot evade RFRA by defining the conditions of service to exclude the possibility of an accommodation. This definitional sleight of hand evades the inquiry that RFRA demands: whether the [Navy's] generalized interest in worldwide deployability is materially impaired by tolerating a few religious objectors and accommodating

²⁰ Reference (z) provides “guidance on mission-critical travel for unvaccinated individuals,” in the name of protect[ing] the health and safety of the force, maintain[ing] mission readiness and comply[ing] with federal, Department of Defense (DoD), Department of the Navy (DON) and Host Nation (HN) guidelines.” Yet, with a litany of countries (including all where I'd conceivably send **SWCC 3**) permitting unvaccinated travel (most with no SARS-CoV-2 testing or quarantine requirements), only our own military guidelines actually preclude his mobilization and travel.

²¹ Although I acknowledge the theoretical possibility that **SWCC 3**'s mobilization could be authorized, the path implemented to actually effectuate that course of action is so onerous, and approval authority so highly-elevated, as to chasten and discourage trying. “[T]ravel of unvaccinated individuals should be minimized. Requests for official travel by unvaccinated personnel outside of the following categories will be routed to the Under Secretary of the Navy (UNSECNAV) for decision via the Chief of Naval Personnel (CNP), the Chief of Naval Operations (CNO) and the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN MRA)” (Reference (z)).

²² I likewise am confident **SWCC 3**'s vaccination status presents no readiness risk in a mass-mobilization (i.e., a “fight tonight”) scenario, which would likely see him recalled CONUS, likely at an NSW Training Detachment (TRADET), to backfill active component personnel surged forward.

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

their continued service to the [Navy] despite the generalized policy of worldwide deployability.” *Colonel Financial Management Officer* at 40. To reiterate, I will carry out my orders as delivered and will continue to enforce the Navy’s policy on the travel of unvaccinated Sailors. As I understand my role under RFRA and implementing instructions, however, I owe it to you to be the Navy’s point man – to explain the facts on the ground, as the Commander closer to this individual Sailor and to the operational requirements he might reasonably be called to fulfill, to illuminate the ground-level consequences this policy is having on my force and, hopefully, to help illuminate a path forward that respects RFRA and mitigates these consequences. Again, I acknowledge the atypical length and detail of this endorsement; by putting this level of effort into this at my (and my staff’s) level and providing this level of detail, I am trying to serve as your sensor at the point of impact to convey how this policy impacts this individual and, further, how it impacts his unit and my Force.

37. While I am comfortable and confident that **SWCC 3** remaining unvaccinated will not impair mission accomplishment or readiness, generalized policy – which does not account for **SWCC 3**’s age, his health, his fitness, his prior infection, specific mission or training requirements, location of mission, country entry requirements, or any number of other salient factors – has dictated otherwise, his deployment not deemed “mission critical,” per reference (z). The costs of this policy – and, more broadly, the costs of the growing perception of how unvaccinated members seeking accommodation for their faith have thus far been treated by the Navy – cannot be discounted or ignored. Most immediately, these policies – and nothing else – prevent me from traveling talented, experienced, capable, and healthy operators and support personnel to training evolutions to maintain their proficiency and from deploying them downrange to fill validated and vetted requirements²³. The consequences of these policies have caused manning shortfalls, which are now compounding²⁴. **SWCC 3** is a high-demand, low-density asset in whom the Navy has invested a considerable amount of time, effort, and money, and he has operational value in the locations I might send him but for this policy. He is a good Sailor and I do not want to lose him but, if these policies persist without exceptions for those, like **SWCC 3**, who merit them, I fear that is what will happen and, as a result, my ability to support validated DEPORD and other NSW/SOCOM requirements may be jeopardized.

38. Furthermore, the costs of current policy to my ability to recruit and retain SEAL and SWCC members in my fenced community are manifest and profound. NSWG-11 closely tracks a number of data sets and metrics spanning three to 10 years, which we have used to reliably project inventory for our fenced SELRES force – enlisted Special Operators (SO), enlisted Special Warfare Combatant Crewmen (SWCC), and SEAL Officers (1135). Leading into fiscal year 2022, this data projected a net annual gain of 10 personnel in our fenced community. Fiscal year 2022 ended with a net loss of 28 personnel. This 38-person divergence from our data-

²³ For instance, the #1 SEAL Officer on **SWCC 3**’s dwell list and the #1 SEAL enlisted member on **SWCC 3**’s dwell list are both healthy, fit, capable, experienced, and respected special operators who exercised their right to submit religious accommodation requests and have since caught and recovered from SARS-CoV-2, with test results evidencing SARS-CoV-2 antibodies.

²⁴ The prohibition on mobilizing the above-mentioned SEAL Officer to fill an upcoming deployed SOF Task Element Officer in Charge (OIC) billet left me with no appropriate SELRES SEAL officer outside of dwell. As a result, an active duty NSW command will be asked to provide a SEAL officer to fill this SELRES role. While this course of action may buy time, it does not mitigate the growing manning issues or their primary root causes – policies curtailing unvaccinated travel combined with declining recruiting and retention metrics.

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

driven projections prompted me to launch a “Naval Special Warfare Reserve Component Retention Survey” to better understand the factors driving SELRES members out of the Navy; this trend, if left unabated, will negatively impact force readiness and the ability to provide strategic depth and qualified SELRES members to fill NSW mobilization requirements. Over 40% of my total force, comprised of SEALs, SWCCs, and Combat Support/Combat Service Support (CS/CSS) Sailors, completed the survey, with especially strong support from members of my fenced community. 79% of SELRES SEALs completed the survey and provided valuable feedback. Enclosure (15) is a force-facing summary of those results; this document does not include an additional 67 pages of illuminating, and often constructive, open-ended comments from the survey respondents. For privacy reasons, I will not include this longer document as an enclosure but am happy to provide a copy upon request.

39. In the context of **SWCC 3**'s request for accommodation of his religious exercise and similar requests from other Sailors of faith in my claimancy, two survey questions merit specific mention. Question 10 asked respondents to what degree their values align with those of today's Navy, and question 14 asked them to select “up to 5 factors influencing, or that might influence, you to leave NSW or the Navy.” The answers to both – in particular, the often-lengthy comments my members took the time to provide – are concerning and unambiguously expose the scar tissue resulting from the manner in which they have seen their religious accommodation requests, and those of their brothers and sisters in uniform, adjudicated²⁵ by the Navy. Given the persistent challenges presented by life in the Selected Reserve, which requires juggling and balancing a civilian career, a military career, and a personal/family life, I would have expected “work/life balance issues” to be the most-selected factor influencing SELRES members to leave the Navy. It wasn't. Of 36 possible answer choices, “Politicization of the military” was the most-selected factor, chosen by 37.86% of all respondents, and feedback regarding the Navy's treatment of religious exercise in the context of SARS-CoV-2 permeated the comments. Similar sentiments were unambiguously conveyed in my DEOCS survey results and correspondent focus groups. *This* is having a predictable and detrimental effect on the morale and readiness of the NSW Reserve Force.

40. Reference (d) argues, “Strong coercion creates significant social harms. Covid-19 vaccine mandates have often involved a high degree of coercion, effectively ostracizing unvaccinated individuals from society²⁶.... When such mandates are not supported by a *compelling* public health justification and where exemptions are not easily available, the likelihood of reactance and negative social effects are increased.[.]” (Emphasis in original.) I've seen “unit cohesion” raised as a compelling interest justifying the injection of Sailors over their sincere religious objections, yet over the past two-plus years I've observed these policies, and the manner in which religious

²⁵ Paragraphs 5 and 11 pertain.

²⁶ A recurring theme in survey comments. One example, from a SEAL respondent: “DOD and DON's actions on pushing the COVID vaccines has done undetermined damage to the community and breached my trust plus many of my teammates, especially those who are religious. I myself took the vaccine and have since regretted it. The long term health effects of the vaccine are still to be determined. I can only hope that the improperly tested and researched vaccine will not have long term consequences. Furthermore, I've observed members of my community who did appropriately research the vaccine and as a result, refused to take the vaccine. Instead of being praised for their moral courage, these members have been ostracized by the DOD with an undetermined fate in the military and a mark as ‘undeployable’. Furthermore, the amount of mental and emotional stress these members have endured (not to mention the countless hours they devoted) to request the appropriate religious accommodations is unjustifiable.”

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

accommodations requests have been processed and adjudicated, tear and fray at the fabric of unit cohesion to a far more detrimental extent than the presence of a few unvaccinated Sailors, like **SWCC 3**. Similarly, I've seen "good order and discipline" asserted as a compelling interest justifying the denial of religious accommodation requests; I shudder at the inescapable inference that asserting one's rights under RFRA and the constitution threatens good order *and discipline*, much as would criminal violations of the Uniform Code of Military Justice. I personally know the considerable efforts we as a Navy have made to emphasize diversity and inclusion, having previously spearheaded these efforts for the NSW community – and I know how quickly these efforts can be diminished and undermined if protected classes, such as Sailors of deep faith asserting their constitutionally and legislatively-protected Free Exercise rights, are treated with less deference and respect than other groups of Sailors. I recognize that change often moves slowly in bureaucratic organizations as large as ours – but when the constitutionally-protected rights and liberties of our Sailors are placed in jeopardy by the organization's reliance on systems and processes that have produced consistently monolithic results *all in the same direction* – against the individual's Free Exercise rights – and by the organization's failure, or reluctance, to quickly adapt to changing real-world realities, we risk irreparable harm not only to Sailors of faith, like **SWCC 3**, but to our reputation – to our organizational credibility – and to the strides we have taken to foster a genuinely inclusive Naval force. While acknowledging the difficulty of the task faced by CNP and staff, I sincerely hope that appeals, like **SWCC 3**'s, will receive the individualized scrutiny RFRA requires and that the "high bar" the Navy is required to meet not be lowered. Anything less risks rendering our efforts to foster true diversity and inclusion as lip service.

41. To this point, I've primarily addressed the first prong of the two-prong test proscribed by RFRA – whether the Navy has a "compelling government interest" in forcing Sailors of deep faith, such as **SWCC 3**, to receive a pharmaceutical injection in violation of their faith. For the reasons discussed above, it is apparent that the Navy can no longer clear that "high bar." Accordingly, while I see no imperative in exhaustively addressing the second prong of the RFRA test – that is, whether vaccinating **SWCC 3** over his religious objection is "the least restrictive means of furthering that compelling governmental interest" – I must nevertheless acknowledge that the "least-restrictive-means standard is exceptionally demanding," *Burwell*, 573 U.S., at 695-96, and also that, to this point, the Navy appears to have made, at best, a generic effort to address that standard, as the letter denying **SWCC 3**'s religious accommodation request contains the same wording as the letters my other requesting Sailors received, wording that asserts broad and general observations rather than addressing the particular context of each Sailor's request "to the person."

42. As repeatedly noted throughout this endorsement, **SWCC 3** has previously contracted and recovered from SARS-CoV-2. The overwhelming number of studies examining natural immunity following symptomatic SARS-CoV-2 infection support the proposition that natural immunity provides strong and often superior protection against SARS-CoV-2 relative to vaccinated immunity. "In February 2022, the CDC estimated that 67% of adults 18-49 had infection-induced SARS-CoV-2 antibodies, up from 30% in September 2021. [Reference (bb).] By now [], the majority of young adults, both vaccinated and unvaccinated, have most likely already been infected with Covid-19. Evidence increasingly shows that prior SARS-CoV-2 infection provides at least similar clinical protection to current vaccines [references (cc), (dd), and (ee)], something that is not acknowledged in current [Navy] policies. *It is not clear whether*

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

vaccination of previously infected individuals provides any meaningful benefits with respect to severe disease, especially for healthy young people. [Reference (ff)]” (Reference (d)).
(Emphasis mine.)

43. Enclosure (16), an oft-cited real-world Israeli study that, while not peer-reviewed has nevertheless been shown to use accurate methodology (Enclosure (17)) and which remains perhaps the most comprehensive on the topic, establishes that contracting SARS-CoV-2 and naturally mounting an immune response to it during recovery, as **SWCC 3** did, offers greater protection from future reinfection and severe disease than the mRNA vaccines. Additionally, most of the studies cited in paragraphs 13 through 29 of this endorsement acknowledge the protective benefits of natural immunity with Omicron as the dominant SARS-CoV-2 variant, and the CDC’s acknowledgements mirror these findings. Reference (aa), a CDC report, analyzed SARS-CoV-2 cases in New York and California from 30 May to 20 November 2021, comparing the risk of infection against several cohorts. The data clearly illustrated that natural immunity provided more protection against infection during the Delta wave compared to vaccinated immunity – 35x protection compared to 8.3x protection, respectively, in California. More recently, the CDC’s 11 August 2022 guidance acknowledges the protection provided by prior infection and recovery, as discussed in paragraph (13). Furthermore, as reflected in Enclosure (18), the CDC concedes it has no record of anyone with natural immunity transmitting SARS-CoV-2, which undermines the argument that **SWCC 3** would place his shipmates at greater risk of contracting the virus by remaining unvaccinated.

44. While Navy Medical officials have argued that “prior infection is not a reliable source of immunity,” discounting the considerable body of evidence and, most recently, the CDC’s own guidance documenting natural immunity’s benefits, neither are the approved vaccines. Furthermore, “[u]sing a national population-wide dataset in Qatar, both previous infection alone and vaccination alone were found to provide >70% protection against severe, critical or fatal Omicron (BA.1 or BA.2). [Reference (gg).] *Prior infection alone was 91% effective whereas protection from two or three doses of vaccine alone was 66% and 83%, respectively.* Covid-19 does cause acute illness, and may have long-term effects for some, particularly those who develop critical illness, but vaccination appears to confer at best modest protection against longer-term sequelae [reference (hh)] and the existing data are non-randomized, from variants that predate Omicron and with unclear relevance for current adults under age 40” (Reference (d)). (Emphasis mine.) In sum, if the lion’s share of evidence, and our own CDC’s guidance, argues that natural immunity offers meaningful protection from contracting or spreading SARS-CoV-2 (which the vaccines do not) and also from hospitalization and death from the virus, how can I credibly argue that **SWCC 3**’s naturally inquired immunity is not sufficient to acquit the Navy’s interests in health, safety, and readiness? It is certainly less restrictive than injecting him with a pharmaceutical at the expense of his religious convictions and observance.

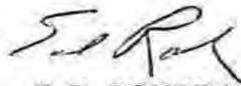
45. Non-pharmaceutical measures such as proper wear of N-95 masks and vigilant personal hygiene also have shown efficacy in slowing the spread of SARS-CoV-2 and helped **SWCC 3** and the rest of my NSW RC Sailors complete mission during the height of the pandemic in 2020, when no SARS-CoV-2 vaccines were available. Although I dislike the optics of requiring *only* unvaccinated personnel, a large percentage of whom are religious objectors like **SWCC 3**, to wear masks, as this singles-out and ostracizes these Sailors of faith, especially in consideration of CDC’s guidance that no longer differentiates between vaccinated and unvaccinated due to the

Subj: APPEAL OF DENIAL FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

prevalence of breakthrough infections. I nevertheless acknowledge that masking, along with an array of other safety protocols, helped my claimancy weather the worst of the COVID storm. There are also CDC-recommended antiviral and other therapeutics that can be taken to help reduce incidence of hospitalization and death after diagnosis. Although these non-pharmaceutical measures have obvious shortcomings, implemented in conjunction with [REDACTED] SWCC 3's natural immunity from prior infection they are as, if not more, effective as the vaccines alone in maintaining military readiness and the health of the force and are unquestionably less restrictive than compelled injection.

46. In closing, I recognize the length of this endorsement may appear unorthodox. Nevertheless, my staff and I have invested this time and effort because applying risk-benefit analyses accounting for SWCC 3's age, health status, mobilization potential, mission requirements, and prior infection, amongst other variables, is necessary to abide by the governing law and because, frankly, I have already seen the negative impacts on my manning, the stress on the force, and the man hours lost due to the one-size-fits-all manner in which religious accommodation requests have been adjudicated at higher echelons. I cannot afford to unnecessarily lose more quality Sailors of faith from my ranks.²⁷ I sincerely hope that you consider in good faith and with an open mind the positive value proposition of (and legal basis for) granting this Sailor's religious accommodation request and reach similar conclusions to mine – that denying SWCC 3 accommodation does little to further the Navy's compelling interests nor is injection the least restrictive means of furthering these interests.

47. My point of contact for this matter is CDR Timothy Pasken, who can be reached at [REDACTED]


E. B. ROHRBACH

Copy to: [REDACTED]

²⁷ If not through administrative separation, through resignation, refusal to re-enlist, or loss of trust in their senior leadership's commitment to upholding RFRA and the Constitution's free exercise protections